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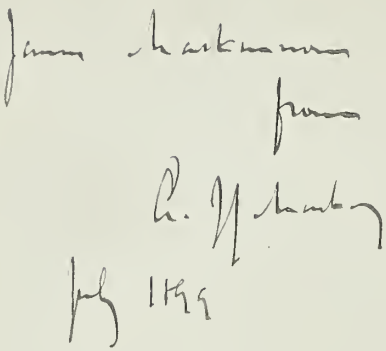

MEMOIR

OF

SIR JAMES DALRYMPLE

FIRST VISCOUNT STAIR.

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MEMOIR

OF

SIR JAMES DALRYMPLE

FIRST VISCOUNT STAIR

PRESIDENT OF THE COURT OF SESSION IN SCOTLAND

AND AUTHOR OF THE "INSTITUTIONS OF THE LAW OF SCOTLAND"

A STUDY IN THE HISTORY OF SCOTLAND AND SCOTCH LAW DURING THE SEVENTEENTH CENTURY

BY

Æ. J. G. MACKAY

ADVOCATE OF THE SCOTCH BAR.

EDINBURGH

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PREFACE.

The work which follows contains a Memoir or Memorials rather than a Biography of Lord Stair, for the materials necessary for the latter scarcely exist. Especially in those minute particulars required to form a living picture of a man removed by nearly two centuries from our own times, there is a blank in the information with regard to Stair. A fire at Castle Kennedy is said to have destroyed most of the early papers of the Dalrymple family, and I have been informed by Dr. John Stuart, of H.M. General Register House, Edinburgh, who recently examined them for the Historical Commission, that there are none relating to its founder. It is possible, however, that letters of or referring to Stair may still be extant. Should any reader possess such he will do a favour by communicating them to me. I have thought it expedient to give at length most of the letters of Stair which have come under my notice. These bring us in closer contact with the man than any remarks which can be made about him.

For an account of his public acts and an estimate of his character as a Statesman, Judge, and Author, there is ample matter, which I have tried to condense rather than to exhaust.

How far it has been necessary to enter into general history is elsewhere explained.

While giving Stair his place as the central figure, the attempt has been made to trace the progress of Scotch law during the seventeenth century, its golden age—like other golden ages not without much dross, —and to commemorate some of the more eminent of his contemporaries, both legal and political.

An acknowledgment is due to the writers who have already treated the same subject—Professor Forbes, in his Preface to the *Journal of the Sessions*, Dr. Murray, in the *Literary History of Galloway*, and Dr. David Irving, in his *Lives of Scottish Writers*. They have indicated many, though not all, the sources from which this Memoir has been composed; but the original authorities have in every case been consulted. The principal of these are the Munimenta of the University of Glasgow; the Letters of Principal Baillie; the Histories of Clarendon, Burnet, Sir George Mackenzie, and Wodrow; the State Papers of Clarendon, Thurloe, Lauderdale, Lord Melville, and Carstaires; the Decisions and Miscellaneous Writings of Sir John Lauder

of Fountainhall; the Acts of the Scotch Parliament; the Sederunt Books of the Court of Session and Justiciary; and the Minutes of the Privy Council. I have made more copious quotations from these contemporary sources than is usual, wishing to enable the reader to test the accuracy of conclusions which sometimes differ from those of writers of great and deserved reputation. To two living authors, Mr. John Hill Burton, Advocate, the historian of Scotland, and Mr. David Laing, Librarian of the Library of the Writers to the Signet in Edinburgh, who have done much to elucidate the history of this period, I desire to offer grateful thanks.

In treating of Stair's Work, the *Physiologia Nova Experimentalis*, I have been reluctantly compelled to refer to matters on which my knowledge is entirely second-hand, but the authorities on whom I have relied are, I hope, sufficiently indicated. In regard to this part of the subject I owe much to the learning of Mr. W. H. Hudson, Fellow of St. John's College, and Mathematical Moderator in the University of Cambridge; and of the Reverend W. R. Smith, Professor of Hebrew in the Free Church College in Aberdeen. Another friend, Mr. Alexander Gibson, Advocate, was good enough to read the proofs, and made many valuable suggestions.

Written in the intervals of leisure alone available to the lawyer who does not abandon the practice of his profession for literature, this Memoir requires indulgence. Such intervals, however, are of considerable length in the lives of most young lawyers—in this respect, I think, more fortunate than they are sometimes willing to imagine.

CHRONOLOGICAL TABLE.

1619.	May 1619—Birth of Stair at Drummurchic in Ayrshire.	
1629.	At Mauchline Grammar School.	
1633.	At Glasgow University as Student.	Charles I. crowned at Holyrood.
1637.	Laureate in Arts.	
1638.	Comes to Edinburgh.	28th February—The Covenant signed in Greyfriars Church. Glasgow Assembly.
1639.	Serves in Glencairn's Regiment in the War of the Covenant.	Pacification of Dunse.
1640.		3d November—Long Parliament meets.
1641.	Elected, after examination, Regent at Glasgow University.	Charles I. visits Scotland.
1642.	Visitation of the University—takes part in Overture as to College rents—and in call of Robert Baillie, as Professor.	4th January—Arrest of the Five Members. 23d October—Edgehill.
1643.	Marries Margaret Ross of Balneil in Wigtonshire—resigns and is re-appointed Regent.	
1644.	Visits Edinburgh to petition for relief of College from excise.	3d July—Marston Moor.
1645.		10th January—Laud beheaded. 14th June—Naseby.
1646.		5th May—Charles surrenders to Scots at Newark.
1647.	Resigns office of Regent.	
1648.	February 17—Admitted Advocate.	4th October—Cromwell in Edinburgh.
1649.	March 17—Goes to the Hague as Secretary to the Commission sent to Charles by Parliament of Scotland—One of the Commission for revising the laws.	30th January—Charles I. beheaded. 5th February—Charles II. proclaimed King at Edinburgh.
1650.	Goes to Breda as Secretary to the Commission sent to Charles by Parliament—arrives there 15th March—returns to Scotland with the Closed Treaty. May 20—Sent to meet the King at his landing in Scotland.	20th April—Montrose lands in Scotland, is taken prisoner, and beheaded 21st May. 23d June—Charles II. lands at Bogue of Gight. 3d September—Dunbar.

1651.	Practises as Advocate.	1st January—Charles II. crowned at Scone. 1st September—Monk takes Dundee. 3d September—Worcester.
1652.		18th May—Commissioners appointed in Scotland for Administration of Justice.
1653.		16th December—Cromwell Lord Protector.
1654.	Refuses to take the Tender.	Monk Commander-in-Chief in Scotland. 19th July—Engagement at Loch Garry.
1655.		Cromwell's Council for Scotland appointed.
1657.	Appointed Judge by Monk—his appointment confirmed by Cromwell.	8th May—Cromwell refuses the title of King.
1658.		3d September—Death of Cromwell.
1659.	Confers with Monk previous to his march to England.	18th November—Monk marches towards England.
1660.	Visits London with Lord Cassilis after Restoration.	1st January—Monk enters England. 4th February—Marches into London. 29th May—Charles II. makes his entry into London.
1661.	Appointed Judge of Court of Session by Charles II.	1st January—Scotch Parliament meets. 28th May—Earl of Argyle beheaded.
1662.		Episcopacy restored.
1663.	Refuses to sign Declaration.	Fall of Earl of Middleton. Lauderdale Minister for Scotland.
1664.	Resigns his office of Judge—his place declared vacant—visits London, satisfies Charles, and is restored—visits Paris—Created baronet.	
1665.		24th April—The Plague breaks out in London.
1666.		Dutch defeated by Monk and Prince Rupert.
1667.		Peace of Breda. 2d September—Fire of London. 27th November—Pentland Hill.
1668.		Triple Alliance.
1669.	Marriage and death of his daughter Janet, the Bride of Lammermoor.	
1670.	One of the Commissioners for Scotland to treat of the Union.	Government of the Cabal.
1671.	January 7—Appointed President of Court of Session.	
1672.	M.P. for Shire of Wigton—Act regulating the Judicatories.	

1673.	Again M.P. for Shire of Wigton.	29th March—English Test Act.
1674.	Secession of the Advocates.	
1676.	Town-Council of Edinburgh order his house-rent as President of Court of Session to be paid.	
1677.	Supports a more clement policy towards Covenanters—opposes bringing Highland Host into West Country and the Bonds of Peace.	January—Execution of James Mitchell for attempt to murder Archbishop Sharpe. 12th August—Popish Plot.
1678.	Convention of Estates in which Stair represents Wigtonshire.	
1679.	Visits London to defend Court from charges made against it—Speech to Duke of York at Holyrood.	1st May—Murder of Archbishop Sharpe. 27th May—Habeas Corpus Act. 1st June—Drumclog. 22d June—Bothwell Bridge.
1681.	M.P. for Wigtonshire and on Committee of Articles—Stair's Act as to Execution of Deeds—Test Act—retires from office rather than take Test—publishes the *Institutions of the Law of Scotland.*	Duke of York in Scotland. Trial and conviction of Earl of Argyle, who escapes from prison 19th December.
1682.	Takes refuge in Holland.	19th October—Shaftesbury withdraws to Holland.
1683.	First volume of Stair's *Decisions* published.	14th June—Ryehouse Plot.
1684.		
1685.	Outlawed for treason.	6th Feby.—Death of Charles II. 30th June—Argyle beheaded.
1686.	Publishes *Physiologia Nova Experimentalis.*	
1687.	James Dalrymple, Master of Stair, Lord Advocate—Stair's outlawry remitted. Second volume of Stair's *Decisions* published.	Newton's *Principia* published.
1688.	Returns with William of Orauge.	5th November—Prince of Orange lands at Torbay.
1689.	Again President of Court of Session.	14th March — Convention in Scotland. 26th May—Killiecrankie. 20th July—Episcopacy abolished in Scotland.
1690.	Attack on himself and family by the Club—publishes his *Apology*—Created Viscount.	1st July—Battle of the Boyne.
1691.	Supports Embodiment of Militia.	
1692.	His wife dies.	February—Massacre of Glencoe.
1693.	Second edition of the *Institutions of the Law of Scotland* published.	
1694.		
1695.	*Vindication of Divine Perfections* published. November 25—Death of Stair.	Inquiry as to Glencoe.

Il faut éclairer l'histoire par les lois et les lois par l'histoire.—Montesquieu, *L'Esprit des Lois.*

Certe cognitio ista (*i.e.* jurisprudentiæ cognitio), ad viros civiles proprie spectat; qui optime norunt quid ferat societas humana, quid salus populi, quid gentium mores, quid rerum publicarum formæ diversæ; ideoque possint de Legibus ex principiis et præceptis tam æquitatis naturalis quam politices decernere.—Bacon, *De Dignitate et Augmentis Scientiarum*, Lib. viii.

Scotch Judge.—Whaur did ye get that frae?
Scotch Advocate.—From Stair, my Lord.
Scotch Judge.—Na, na. There 's nae nonsense in Stair.

CHAPTER I.

1619-1637.

Ancestry of James Dalrymple, afterwards Lord Stair—William Dalrymple, a cadet of the Dalrymples of Dalrymple, acquired the small estate of Stair in Ayrshire by marriage with Agnes Kennedy in reign of James II.—Their son William married Marion Chalmers of Gadsgirth, one of the Lollards of Kyle—The great-grandson of Marion Chalmers, great-grandfather of Lord Stair, James Dalrymple of Stair, belonged to the party of the Assured Lords, and was an adherent of the Reformed Faith—His son, James Dalrymple, also a Protestant, joined the association of 1567 in favour of James VI.—Neither the grandfather nor father of Stair notable—His mother, Janet Kennedy, sprang from a family which had taken the side of the Reformers—Stair born in 1619 at Drummurchie—His father died when he was five years old—Soon after which he was sent to Mauchline Grammar School by his mother—Groundless tradition of his father's murder—Stair went to Glasgow University in 1633, and graduated in arts in 1637—Description of Glasgow at this period.

The attempt has been made in the following memoir to delineate the life of the greatest lawyer Scotland and one of the greatest Britain has produced. Though specially attractive to members of his own profession, to whom it affords an example of well-directed talent and indomitable perseverance, others besides lawyers may perhaps learn something from a life of Lord Stair. The age in which he lived was one of the most memorable in our national history, and he played, though not a leading, yet an important part in it. The life of an ordinary Scotchman or Englishman, who had lived through all and taken part in many of the great events of the seventeenth century, would probably afford some points of general interest. But he was no ordinary man who, after serving in the opening scene of the civil war, became one of the earliest professors of philosophy in Glasgow, who went as secretary to the Commis-

sioners from the Scotch Parliament to Charles II. at the Hague and Breda, who was the intimate of Monk and Lauderdale and the companion of William of Orange in his voyage to England, who twice raised himself to the Presidency of the Supreme Court in his native country, and wrote the earliest and the best complete treatise on its laws.

The temptation indeed is great to enlarge the canvas and endeavour to show the manner in which Scotland passed through the vicissitudes of this revolutionary era, the last in which it held an independent place in political affairs, and to explain the influence it exercised on the settlement of the civil and ecclesiastical constitution of the United Kingdom. But the history of this period will here be touched on only so far as requisite to elucidate the life and character of Stair. For this purpose, however, it is necessary to enter more into general history than persons acquainted with Stair only as a lawyer would anticipate. The troubles of the closing years of the reign of Charles I., the brief but pregnant interlude of the Commonwealth—a period scarcely enough noticed by Scotch historians, the Restoration and reigns of the two last Stuart kings, and the completion of the Revolution settlement in Scotland, were the scenes in which the drama of his life was acted.

James Dalrymple, afterwards Lord Stair, was born in a station which makes it worth while to cast a glance backward beyond his parents at his ancestry. The family from which a Scotch gentleman of this time sprang was one of the conditions almost certain to affect his future life, and in the case of Stair its influence may readily be observed. His father, James Dalrymple, was laird of Stair, a small estate of 168 Scotch acres, situated in the district of Kyle,[1] in Ayrshire, on the

[1] Kyle is the central district of Ayrshire, between the Doon and the Irvine, and is subdivided by the Water of Ayr into King's Kyle on the south, and Kyle Stewart on the north. "Near to this place," *i.e.* Uchiltree, "to the westward, on the river Air, in King's Kyle, is situat Stair, the inheritance of James Dalrymple, Knight and Baronet, who being learned in the

southern side of the Water of Ayr, about halfway between the town of Ayr and the village of Mauchline. This estate had come to the family through the marriage, in the reign of James II., of William Dalrymple, a cadet of the ancient house of Dalrymple of Dalrymple, which can be traced as far back as the reign of Alexander III., with Agnes Kennedy, heiress in right of her mother of the barony of Stair Montgomery. A dispensation by Bishop Kennedy of St. Andrews, as the Pope's delegate permitting the marriage, though within the forbidden degrees, is extant amongst the Stair papers.[1] Their son, William Dalrymple of Stair, the lineal ancestor of Lord Stair, in the seventh generation, married a daughter of Sir John Chalmers of Gadsgirth. This lady, Marion[2] or Isobel Chalmers,

laws, was admitted an ordinar judge of Session in the first nomination and settlement of the judicatory by Charles the Second" (his appointment as judge by Cromwell is passed over in silence), "after his Restoration anno 1661, and President anno 1671. And being removed from that office in the year 1681, was by their Majesties restored to be President of the Session in the year 1689. And in anno 1690 was created Viscount of Stair."—Second Edition of Camden's *Description of Scotland*, Edinburgh, 1695, *by Sir James Dalrymple of Borthwick*, the second son of Stair. The extent of the estate of Stair is stated at 168 acres in the *Statistical Account of Scotland.*

[1] "The surname of Dalrymple was first used by Adam de Dalrymple, who possessed the barony of Dalrymple in the reign of Alexander III. There is a charter in the rolls of King Robert III., the first year of his reign, anno 1371, ratifying a grant which Malcolm filius Gilchrist filius Adae de Dalrymple made of the half of the barony of Dalrymple to Sir John Kennedy, and the granter having then a son, John Dalrymple, who gets a charter about the same time of the whole dominium de Dalrymple, it is no stretch, but a very modest computation in chronology, to place Adam, the great-grandfather, as high as Alexander III.'s time."—CRAWFORD'S *Peerage*, p. 451, Note A. The same author observes, Note D, "The Montgomeries of Stair were certainly one of the ancientest and best extracted families in Airshire. I observe that Allan de Mundegumbri del Conto, de Ayr, their ancestor, is in the Ragman Roll or the submission of the Scots Barons to Edward I. of England, anno 1296." "Adam de Dalrymple," we are gravely informed by the author of the life of Stair's grandson, John Earl of Stair, "was a gentleman of uncommon parts and deep penetration."—*Life of John Earl of Stair*, p. 6.

[2] It is uncertain whether her name was Marion, as Forbes states he saw her called in writings in the Earl of Stair's hand,—Preface to Forbes's *Journal*, p. 29, —or Isabella, as she is named by Knox and by Nisbet.

was one of the Lollards of Kyle, as these precursors of the Reformation were named from the district in which they chiefly dwelt, against whom the Scotch Parliament directed an Act in 1424. She is mentioned by John Knox as one of the members of that sect who were summoned in 1494 before King James IV. and his Great Council, by "Robert Blackadder *called* Archebishope of Glasgow."[1] The great-grandson of Marion or Isobel Chalmers, the great-grandfather of Lord Stair, James Dalrymple of Stair, was amongst the earliest and firmest professors of the Reformed Faith. He belonged to the party of the Assured Lords, who, under the protection of Henry VIII., and the leadership of Matthew, Earl of Lennox, and William, Earl of Glencairn, a name we shall meet in the life of Stair, opposed the Regent Arran, who of vacillating disposition and alarmed at Henry's ambitious tactics had abjured the new doctrines. For his share in the gathering[2] at the Muir of Glasgow in 1544, Dalrymple incurred forfeiture for treason, but this forfeiture was remitted in 1555.

His son inherited, with the name and estate, the principles of his father. His signature is attached, along with a number of barons and gentlemen of Kyle, Cunningham, and Carrick, to the memorable Bond for the maintenance of the preaching of the Gospel, and the defence of the whole body of Protestants within the realm, entered into at Ayr on 4th September 1562. The second James Dalrymple joined the Duke of Chatelherault in opposing Queen Mary's marriage to Darnley, and for the part he took in the Duke's attempt to seize Darnley the family estate was again forfeited in 1565, but was restored in the following year.

[1] See the curious account of the Lollards of Kyle, their articles, thirty-four in number, and their trial, in which Adam Reid de Barskymming, their leader, triumphs over Blackadder, in Knox's *History of the Reformation*, p. 17.

[2] As to this gathering, see *Diurnall of Occurrents in Scotland*, p. 32, and Tytler's *History*, iii. 24.

After the murder of Darnley, he was one of those who engaged in the Association of 1567, by which the Confederates[1] bound themselves "to inaugurate the Prince, and with all their strength and forces promote, concur, fortifie, and assist in the promoting and establishing him in his kingdom and government, as becomes faithful and true subjects to do to their Prince."[2] Neither the grandfather of Lord Stair, John Dalrymple of Stair, nor his father, James Dalrymple of Stair, rose out of family into national history; the former succeeded to the estate of Stair in 1586, the latter in 1620.[3]

The mother of Lord Stair was Janet Kennedy, daughter of Fergus Kennedy of Knockdaw by Helen Cathcart of Carleton. His maternal ancestors,[4] like his paternal, were noted adherents of the Reformation. He was thus descended, on both sides, from those independent landed men to whose swords, as well as to the words of the preachers and the blood of the martyrs, Scotland owed her Reformation.

In the month of May 1619, in part of the farm buildings of Drummurchie, or Drummorchie,[5] in the parish of Barr and district of Carrick, in Ayrshire, James Dalrymple, afterwards Lord Stair, was born. That farm, now the property of his descendant, Sir James Fergusson, then belonged to his father, and his mother is said to have given birth to her child there on a journey home-

[1] Amongst the signatures to the Bond besides that of Dalrymple we find Alexander, Earl of Glencairn, "the good Earl," son of that William, Earl of Glencairn, with whom Dalrymple's father fought at Glasgow Muir, and ancestor of William, Earl of Glencairn, under whom Stair served in 1639, as well as that of James Chalmers of Gadsgirth, the representative of the family of Marion Chalmers, the ancestress of Stair.

[2] Crawford's *Peerage*, p. 453.

[3] See their titles to the estate, Mag. Sig., Lib. xliii. No. 311, Lib. xlix. No. 309. The former is a Charter, in 1603, to John Dalrymple in liferent, and his son James in fee; the latter is a Charter of Confirmation, 1620, to James Dalrymple and his spouse Janet Kennedy in liferent, and to the heirs and assignees of James in fee.

[4] Forbes's Preface, p. 29.

[5] *Statistical Account of Scotland*, Ayrshire, p. 409.

wards to Stair from a visit in the North. There is no trustworthy record [1] of his having had either brothers or sisters, and at the age of five he lost his father. The tradition that his father was murdered, and that Stair forfeited his estate by killing the murderer and was obliged to fly the country,[2] though narrated by his descendant Sir John Dalrymple of Cranston, has never received corroboration, and is destitute of internal probability. There is no evidence of either of the alleged murders, or that the estate, twice forfeited by his ancestors, was at this time forfeited by Stair. It does not appear that he ever quitted Scotland till sent to Holland in 1649, and from 1633 we have a nearly continuous record of his life. Such an act of vengeance would be quite inconsistent with a character which his admirers have described as mild, his detractors as cunning, but no one as passionate or resentful. The story is an instance of the falsehoods which find their way into history—unfortunately not the last we shall encounter in the life of Stair.

Like many other men of note, he owed much to his mother, who, Forbes[3] tells us, was "a woman of excellent spirit," and "took care to have him well educated."

[1] The anonymous author of the *Life of John Earl of Stair*, however, says that "Stair being only a younger brother, was trained up for a liberal employment," but gives no authority; and there is no evidence for this statement, apparently introduced to excuse Stair having held such a position as that of a Professor.—*Life of John Earl of Stair*, p. 6.

[2] "He lost his estate in his youth for killing the murderer of his father, and was obliged to fly from his country."—Sir John Dalrymple's *Memoirs of Great Britain and Ireland*, i. 217.

[3] Preface to Forbes's *Journal of the Session*, p. 30. William Forbes, advocate, the author of this Preface, better known by his treatise on Teinds, is the best authority for several of the facts in the life of Stair. His Preface was published in 1713 under the sanction of Hew Dalrymple, Stair's third son, and successor in the office of President of the Court, from whom, as well as other members of the family, there is no reason to doubt he must have derived his information with respect to Stair; indeed he says himself, "I had information and light about the Session and those heroes who have given pains to preserve and commemorate the decisions partly from the

In 1629, or perhaps earlier, he was sent by her to the Grammar School of Mauchline, whence he proceeded to the University of Glasgow in 1633, the year in which Charles I. was crowned at Edinburgh. The earliest mention of his name in the records of that university, which, under a succession of learned Principals, sustained the reputation it had acquired under Andrew Melville,[1] is in March 1635, when he was enrolled amongst the students of the higher classes.[2] He again appears as the first in the list of Laureates or Graduates in Arts on 26th July 1637.[3] The list is divided into classes, and he was undoubtedly in the first class, but whether the arrangement in the class itself, which is not alphabetical, expresses order of merit is not quite certain.[4]

The talents of Stair, however, had certainly been recognised during his college course, for it was at the request of some of the Professors that he returned four years later to compete for a vacant place as Regent. The Principal, during the whole period of his connexion with the university both as student and afterwards as Regent, was Dr. John Strang,[5] one of the

records and history, partly from the honourable and worthy persons following: *Sir Hugh Dalrymple of North Berwick, Lord President of the Session, . . . Sir David Dalrymple of Hailes, late Queen's Advocate* (a grandson of Stair, the father of Lord Hailes), *Sir James Dalrymple of Borthwick, Baronet* (second son of Stair)."

[1] Of Glasgow under Melville his nephew says, "There was no place in Europe comparable to Glasgow for guid letters during these years, for a plentiful and guid chepe mercat of all kynd of languages, artes, and sciences."

[2] Munimenta Universitatis Glasguensis, iii. 88. iv. Nonas Martii ascripti sunt ex superioribus classibus (amongst others) Jacobus Darumplius.

[3] Munimenta, iii. 22. Laureati vii. Calendas Sextilis, anno 1637.

[4] Dr. Laing says, however, with reference to Robert Baillie, whose name appears in the same place in the list of graduates of 1620, he took "the degree of Master of Arts probably with some distinction, as his name stands first on the list of graduates."—Memoir of Baillie prefixed to his Letters, p. xxiii.

[5] Strang was admitted Principal 22d February 1626, two years after the resignation of Principal John Cameron, a divine of note in the French Protestant Church, who had been Professor at Sedan and Saumur before he came to Glasgow as Principal, where he only remained twelve months when

correspondents and father-in-law of Robert Baillie whose busy pen has left so vivid a picture of Scotch affairs in Church and State, and preserved many of his contemporaries from oblivion. Baillie, although much in the society of Stair at a later period as fellow-professor in Glasgow, and his companion on his first visit to Holland, unfortunately tells us nothing concerning him, but his letters show the scenes and the men amongst whom his youth and manhood passed.

The men we shall afterwards come in contact with; but it is worth notice how different Glasgow in the middle of the seventeenth century was from the teeming hive of industry which has now succeeded it. Its population was under 14,000. Its extent was limited to the small portion of the modern town which forms the ancient royalty, and was surrounded by a stone wall with eight ports or gates. The venerable Cathedral, which dates from the end of the eleventh century, the College, founded in the middle of the fifteenth century, the Bishop's Palace and Tolbooth, the broad and clean streets, and noble river, moved the admiration of travellers, who compared it with Oxford. One of these describes it "as the non-such of Scotland, where an English florist may pick up a posie;" another

he returned to France, became Professor of Divinity at Montauban, and died in 1625 at the age of forty-six. His works were collected after his death by his pupils, Louis Cappel and Frederic Spanheim, and published at Geneva. His doctrine, which leant to Arminianism, admitting the possibility of the salvation of all men, was followed by a party in the French Protestant Church called after his name, but more commonly Amyraldists from his pupil Amyraut.—See *Life* by Irving. At Glasgow his lectures, as we learn from Baillie, inculcated conformity and passive obedience (*Memoir* of Baillie by D. Laing, p. 26). His opinions on these points probably rendered his residence at Glasgow shorter than it otherwise might have been. The predecessor of Cameron as Principal, Robert Boyd of Trochrig, held the office from 20th January 1615 to 31st January 1623. Baillie mentions his ability and the flourishing state of Glasgow in his time in the Epistola ad Lectorem prefixed to Boyd's *Commentary on the Ephesians* published in 1652. An account of the writings of Boyd and Cameron will be found in Dr. Walker of Carnwath's *Lectures on Scotch Theology in the Sixteenth and Seventeenth Centuries*, p. 5.

"as not so big nor so rich, yet a much sweeter place than Edinburgh."[1] The source of its future prosperity was already visible. In 1610 it was called, not quite accurately, "the most famous town for merchandise in Scotland;" for its customs were, even in the time of the Commonwealth, under £600, rather less than those of Aberdeen, and a fourth of those of Leith. Half a century later its merchants were quaintly said "to be stuffed with merchandise as their ships swell big with foreign commodities, and returns from France and other remote parts, where they have agents and factors to correspond."[2] In literature, notwithstanding the eminence of its university, then the first in Scotland, Glasgow did not occupy so high a place. The first printer came there in the year Stair left college as a graduate, and though he issued several of the works of David Dickson and Zachary Boyd, Baillie and others of Stair's colleagues as professors published in London, Edinburgh, Rotterdam, or Leyden. It was amidst such surroundings, in a town which was a quiet yet active centre of education and of trade for a small country, that Stair spent ten years of his early manhood actively engaged in the work of education. But before his return to Glasgow as a teacher he repaired to the capital, at that time the theatre of the religious and political movement which was to end in the Revolution.

[1] Ray's *Memoirs*, p. 159; published by the Sydenham Society.

[2] It was not, however, till the Union that the great trade of Glasgow commenced. "Glasgow is a great city of business," writes Defoe in 1727, "and has the face of foreign as well as domestic trade, nay, I may say 'tis the only city in Scotland that apparently increases in both. The Union has indeed served its end to them more than to any other part of the kingdom—their trade being formed by it; for as the Union opened the door to the Scots into our American colonies, the Glasgow merchants presently embraced the opportunity."—Defoe's *Tour in Scotland.*

CHAPTER II.

1638-1647.

Early manhood—Stair in Edinburgh—Sketch of political position at this period—Stair serves in the Earl of Glencairn's regiment in the civil war—Elected a regent or professor in Glasgow University—Subjects of instruction at this time in the University—His contemporaries as professors, Principal Strang, Robert Baillie, David Dickson—Overture as to the college rents—Takes part in Baillie's settlement as professor—Stair marries Margaret Ross of Balneil, and is re-elected regent—Sent to Edinburgh to claim exemption from excise for the University—Resigns office of regent—Influence of University training on Stair.

After taking his degree Stair came in 1638 to Edinburgh, and "there never was," says Forbes,[1] "in Scotland a more important scene than that he had first occasion to open his eyes on." Nor is this expression exaggerated. The events which cost Charles I. his crown and life, and restored Presbyterianism as the form of government of the Scotch national church, had then reached their crisis.[2] For nine years no parliament had been summoned in England, and those which sat in Scotland had sat only to register the Acts of the lords of the articles, whose election, an innovation[3] introduced by James VI., had

[1] Forbes's Preface, p. 30.

[2] The last English Parliament had been dissolved by royal proclamation in March 1629.

[3] "Hitherto, in the election of the lords of the articles, the temporal had nominated eight of the spiritual, the spiritual eight of the temporal, and the commons equal proportions of their own order for the shires and boroughs. An important innovation was now introduced; eight noblemen were chosen by the prelates, eight prelates were again appointed by those nobles; the sixteen selected an equal number of burgesses and lesser barons from the third estate."—Laing's *History of Scotland*, i. 81.

placed in the hands of the bishops the nominees of the king. The trial and condemnation of Lord Balmerino in 1635, under the old Acts[1] against leasing-making, for statements in a petition to the king, neither presented nor published, and surreptitiously obtained, had roused the indignation both of the nobility and the people, which his tardy pardon had not appeased. For the first time since the Reformation a churchman, Archbishop Spottiswoode, was appointed to the high office of Chancellor of Scotland in 1636.

In June 1637 Prynne, Bastwick, and Burton[2] were pilloried in Old Palace Yard, Westminster, for libels on Archbishop Laud. That prelate, for whose ambition the See of Canterbury was too narrow a sphere, had obtained in the previous year the royal sanction to Canons for the regulation of the Scotch church, under which presbyteries were indirectly abolished and the font and altar, with attendant ceremonies, made compulsory in every church. In July his attempt to force a liturgy or service-book upon Scotland was made. It was met by the opposition of the great bulk of the nation, of which the stool of Jenny Geddes,[3] flung at the head of the Dean of Edinburgh in St. Giles's Church, was the rude symbol. In November of the same year the trial of the right to levy ship-money had commenced, and in April 1638 judgment was given against Hampden, who became, in the words of Clarendon, the most famous man in England. On the 1st of March, by which time Stair had pro-

[1] As to Balmerino's trial, see Burnet's *History of his Own Times*, i. 22. Laing, i. 106.

[2] "William Prynne, Barrister, Dr. John Bastwick, and the Rev. Henry Burton, minister of Friday Street Church. Their sin was against Laud and his surplices at All-hallowtide, not against any other man or thing."—Carlyle's *Cromwell*, i. 75.

[3] "No sooner was the book opened by the Dean of Edinburgh, but a number of the meaner sort, with clapping of their hands and outeries, made a great uproar, and one of them, called Jane or Janet Geddes (yet living at the writing of this relation), flung a little folding-stool, whereon she sat, at the Dean's head, saying, 'Out thou false thief, does thou say the mass at my lug?'"—Quoted from *Baker's Chronicle*, 5th Ed. 1670, by Carlyle, *ibid.* i. 76.

bably come to Edinburgh, the Covenant, prepared by the leaders of the tables, Alexander Henderson, the foremost of the Scotch clergy, and Archibald Johnston of Warriston, the uncle of Bishop Burnet (afterwards Stair's colleague on the bench), and revised by Lords Balmerino, Loudon, and Rothes, was signed in Greyfriars Church by great numbers of both sexes of every rank and of all ages.[1] It was speedily circulated throughout the country, and in two months all Scotland, except Aberdeen[2] and the surrounding district, and the towns of St. Andrews and Crail, had adhered to it. Few movements in history can more truly claim the name of national. Not satisfied with the ambiguous concessions of the King's Covenant,[3] a device of the royal commissioner, the diplomatic Marquess of Hamilton, the General Assembly, which met at Glasgow[4] on 21st November 1638, refused to separate at his bidding, condemned the errors of Papacy and Arminianism, the articles of Perth, the canons and liturgy of Laud, abjured prelacy, deposed the bishops, and established the Presbyterian polity. The step was short from

[1] Baillie's *Letters*, i. 52, 62. Laing, i. 136.

[2] Laing, i. 137. "Of noblemen at home," writes Baillie to Spang on 5th April, "who are not counsellors or papists, unto which it was not offered, I think they be within four or five who hes not subscryved. All the shyres have subscryved by their commissioners, and all the tounes, except Aberdeen, St. Andrews, and Craill; yea, the particular gentlemen, burgesses and ministers, have put to their hands; and the parishes throughout the whole country where the ministers could be persuaded on a Sabbath day, all have publiely with ane uplifted hand, man and woman, sworn it."—i. 62.

[3] See Baillie, i. 106, 112, 115, 119. By the King's Covenant the king bound himself to maintain "religion as professed at present, by which Charles taeitly uuderstood the Episcopal, but left it to his subjects to suppose the Presbyterian religion." "It was subscribed with three different explanations; by the privy eouneil in its original sense, that is, exclusive of prelacy; by the professors of Aberdeen with a reservation of Episcopacy, and by Hamilton with an additional reservation of the real presence in the Eucharist."—Laing, i. 143.

[4] Of this famous assembly, besides its own Acts during its twenty-four sessions or sittings, from 21st November to 20th December 1638, see Baillie's *Letters*, and speeially his history of it sent to Spang, i. 118, 176, and drawn up at his leisure coming from Dunsehill.

the field of such religious conflicts to the field of arms, and on 7th June 1639 the army of the Covenanters, under David Leslie, fresh from the victories of Gustavus, confronted the royal troops, led by the king in person, at Dunselaw.

In the war of the Covenant Stair commanded a troop in the regiment of William, Earl of Glencairn, and he may have been one of those captains who, Baillie—himself present as preacher to the Ayrshire troops [1]—tells us, were "for the most part barrons or gentlemen of good note," and who had flying at their tent doors "a brave new colour stamped with the Scottish armes, and this ditton, FOR CHRIST'S CROWN AND COVENANT, in golden letters." But it is not quite certain what part Glencairn's regiment took in the war, though it would appear to have been on the side of the Covenant.[2] The Earl himself, although present at the Glasgow Assembly, afterwards sided with the Marquess of Hamilton, and withdrew from the Covenanters. In June 1639, he came with Lords Aboyne and Tullibardine to Aberdeen in an English collier, "having all this time unhappilie otherways than his forbears, to the losing of heart of all his friends, deserted his countrie." [3] From Aberdeen Glencairn returned home; but it appears, on the whole, improbable that either he or his regiment was present at the Pacification of Berwick, where Charles yielded a reluctant consent to the demands of the Covenanters on the 11th of June. Stair continued, however, to serve as a soldier

[1] Baillie's *Letters*, i. 210, *et seq.*

[2] "He commanded a troop of dragoons in the Parliament's service." Sir John Dalrymple's *Memoirs*, p. 216: "From having been a military commander for asserting and vindicating the laws, rights, and liberties of the kingdom against *the little* pretended invasions of Charles I., he came to overthrow and trample on them all in the quality of a civil officer under Charles II."—Proceedings and Votes of the Parliament of Scotland Stated and Vindicated, 1689.

[3] Baillie's *Letters*, i. 106; Spalding's *History of the Troubles*, i. 145. In Gordon's *History of Scots Affairs*, 1637-41, p. 109, Glencairn is mentioned in a list of Covenanters; but Gordon adds, "True it is that some of these afterwards did forsake the Covenanters' partye."

till the beginning of 1641, but it is not known whether he took part in the short autumn campaign of 1640, in which the successes of the Scotch army at Newburn and Newcastle forced the King to agree to the treaty of Ripon—the conclusion of which was adjourned to London, where the English Commissioners had to attend the Parliament at last summoned by Charles—too late for peace, but not for civil war.

It is in March 1641, when the centre of national strife had shifted from Scotland to London, where the Long Parliament was occupied with the trial of Strafford,[1] that Stair next appears. He was in that month elected a Regent in the University of Glasgow, having been solicited to come forward by some of the professors, his former acquaintances, probably Principal Strang, Robert Mayne afterwards first Professor of Medicine, and David Monro first Professor of Humanity, who were Regents when he took his degree. It is a well-authenticated tradition [2] that Stair appeared as candidate at the competitive examination for this office, dressed in buff and scarlet, his uniform as captain in Glencairn's corps, from which it would appear he was still on active service. His determination to stand was sudden, for in a letter to his cousin, James Chalmers, laird of Gadsgirth, he writes:[3] "As for me, in that only am I discontent that I neither had your advice and approbation *through the celerity of the occasion* to this alteration of my course, nor your opinion since." He retained his Company for some time, but he had now definitely chosen a civil instead of a military career, and was himself in the habit of saying that he then exchanged the camp [4] of Mars for that of

[1] Strafford was impeached 11th November 1640; his trial commenced on 22d March, but was superseded by the bill of attainder, which passed the Commons on 21st April, and the Lords on 8th May. He was executed on the 12th May.

[2] Forbes's Preface, p. 30.

[3] Printed in Nisbet's *Heraldry*, i. App. 5; the date is 27th May 1641.

[4] Forbes's Preface, p. 30: "A Martis ad musarum castra traductus fuit, to use his own phrase."

the Muses. The University Records do not state what were the subjects of the examination in which he came out first; probably the principal were Logic and Greek.[1] The name of one of his competitors has been preserved in the doggerel satire on the Stair family, to which we shall often have occasion to refer :—

> "Tho' non can all Stair's turns and steps descrie,
> Let not his Proteous trophè be past by,
> How Captane Staires in syllogistick field,
> Made Dominie Ronald to his vallour yield;
> At that first triumph, Glasgow Colledge saw
> The juggler turn his sword to ferula."[2]

The date of his admission was 12th March 1641, and he probably succeeded Mr. William Hamilton, who had resigned on the 26th of February. By the oath he took on that occasion he bound himself to attend diligently to the duties of his office and to the business of the College, not to resign before the expiry of six years without leave obtained and on three months' warning, unless he should marry, in which case he was to resign at once, and not to complain if on a vacancy the interests of the College required that another Regent should be put above him.

[1] The anonymous biographer of John, Earl of Stair, says, p. 6: "Syllogistic reasoning and explaining some portions of Greek authors." An account of an examination for a Professorship in 1619 is given in the Munimenta Universitatis Glasg., iii. 377. By an oath prescribed in August 1628, the Regents were to swear before the election, "Se ex numero candidatorum qui se examinandos sistent aut eorum qui gymnasiarchâ proponentur eum qui summe idoneus maximoque Academiae usui futurus videatur electuros." Munimenta, ii. 302. For a competition at St. Andrews, see Lamont's *Diary*, p. 4. There is still a Professorship at Aberdeen to which the election is by examination. The practice of competition went out of use in Glasgow in the beginning of the eighteenth century, but the successful candidate was subjected to a trial, which, however, was almost nominal.—See Munimenta, ii. 385 and 389.

[2] Maidment's *Scotch Pasquils*, p. 180. Ronald was schoolmaster at Linlithgow, and afterwards at Stirling. Mr. Maidment's industrious gleanings in the byeways of Scotch history deserve the gratitude of all students. This collection of Scotch pasquils is specially valuable for the period of Stair's life.

Although it is not stated in the Records that he was elected as Professor of Philosophy, and his proper title appears to have been Regent, there is no reason to doubt that philosophy and especially dialectics or logic[1] were amongst the subjects he taught, and that he may be regarded as the precursor of Francis Hutcheson,[2] Adam Smith,[3] and Thomas Reid,[4] the fathers of Scottish philosophy. Indeed if the division of subjects continued, as is probable, the same as was fixed by the new erection[5] of James VI., while junior Regent, dialectics, morals, and politics, with the elements of geometry and arithmetic, would seem to have been his province. The notes[6] of one of his students, Robert Law, son of Thomas Law, minister of Inch-

[1] Murray, *Literary History of Galloway*, p. 127, takes for granted that these were the subjects Stair had to teach. His intimate acquaintance with geometry is shown by many passages in his treatise Physiologia Nova Experimentalis.

[2] Hutcheson was born in Ireland in 1694, became Professor in Glasgow 1729, and died 1747. His lectures on Moral Philosophy, originally in Latin, but translated after his death, besides their elegance and philosophical merits which are considerable, are remarkable for the frequent use of phraseology and ideas borrowed from the civil law.

[3] Adam Smith, a pupil of Hutcheson's (see Dugald Stewart's Life of Smith) succeeded to his Chair of Moral Philosophy in 1752 (which a Mr. T. Craigie had held in the interval).

[4] Reid was elected on the resignation of Adam Smith in 1763.

[5] See Nova Erectio, in Appendix to Lord Rector's Addresses.

[6] These notes (Adv. Lib. 5. 2. 9) are in a somewhat cramped MS. On the first leaf is written :—"Inchoavimus Compendium Logicae sub viro non parum erudito Mº Jacobo Darumplio, anno domini 1643, Octobris 29," and on the last leaf, "Finem hunc Appendici Compendii Logicae sub Magistro Jacobo Darymplio viro non parum erudito, anno domini 1643, imposuimus Robert. Law." In 1640 the Visitors had approved of an overture of the Professors, under which it was proposed "that the first yeare, besyde the Greek Tongue, there be an Compend of Logick taught."—Munimenta, ii. 455. The books used in Logic will be found in the Ordo et Ratio Studiorum in 1648.—*Ibid.* ii. 316. I am indebted for these references to Professor T. M. Lindsay of the Free Church College, Glasgow.

Law is entered as one of the Novitii in quarta classe Postridie Idus Martii 1643.—Munimenta, ii. 10. There seems little reason to doubt that he is the author of the Memorials edited by Mr. Kirkpatrick Sharpe, a work which shows he had not benefited much by his education in logic.

inman, have been preserved, and show that between 29th October and 29th December 1643, he gave a course, no doubt repeated at least annually, of exegetical lectures upon logic. The system he taught was cramped with the technicalities which the Latin schoolmen had imposed on the Organon of Aristotle, but even formal logic is not without its uses to the future lawyer, whose business largely consists in accurate definition, complete division or distinction, the detection of fallacies, and sound syllogistic reasoning. If we may credit the testimony of Forbes,[1] which is corroborated by the internal evidence of Stair's published works, he did not confine himself to philosophy and logic, but studied hard the Greek and Latin languages, with the history and antiquities of Greece and Rome, in order to the study of the civil law. Indeed a change, presently to be noticed, which was made while he was Regent, in the order of University instruction must have necessitated his studying and teaching all the branches of the College course. Another subject, not mentioned by Forbes, theology, cannot have escaped the attention of the new Regent, whose youth was passed under the shadow of the Covenant, and in daily intercourse with such divines as Principal Strang, whose moderate opinions, unpopular with the zealots, probably coincided with his own, Robert Baillie, who, amidst his professional labours and voluminous correspondence, had ever time for a polemic against Canterbury or Arminianism, and David Dickson,[2] one of the compilers of the Directory for Public Worship, already known by his Explanation of the Epistle to the Hebrews, the most learned Presbyterian of his time in Biblical Exegesis. To this study Stair returned in his old age, but the controversies of the clergy led him to treat it in a devotional rather than polemical aspect, in his Vindication of the Divine Perfections.

[1] Preface, p. 30.

[2] See Life of Dickson, by Wodrow, in Select Biographies, Wodrow Society, ii. 5.

During the six years of his residence at Glasgow, Stair took frequent part in the management of the College business, an occupation which has sometimes discovered in studious men a capacity for affairs.

On 17th September 1642 he joined the other Regents in an overture "anent the ordering of the College Rents," which was addressed to the Commissioners for the Visitation of the University appointed by the General Assembly at St. Andrews in this year. The occasion of the overture was an ordinance by the Commissioners that every Regent should educate his own scholars through all the four classes[1] or years of the College course, instead of taking them, as had been the practice in Glasgow (differing in this from the other Scotch universities), for one year only, and so changing their pupils every year. Proceeding on a preamble reciting this ordinance, the overture stated that,

"for the expeding and facilitating this present motione, we (*i.e.* the Regents) doe of our own accordes unanimously condescend and agrie that the stipends befoir possessed by everie Regent be zet retained, and that the augmentatione already designed to us be his Majesties gracious favour (for reducing our stipends to an ner equalitie) be thus disposed, viz., Fiftie merks for the first and second Regents a piece, ane hundred merkis for the third, two for the fourth, and ane hundred merkis for the Master of Humanitie.[2] So that for the further encouragement of those that now have or

[1] The four classes were Bajans in the first year; Semi Bajans, the second; Bachelors, the third; and Magistrands, the fourth,—when the philosophical course ended and the students laureated or took the degree of M.A.—D. Laing's Note to Baillie's *Letters*, ii. 39. In 1642 there were 60 Bajans, 40 Semies, and 20 Laureates attending Baillie's classes. The origin of "Bajan" is obscure. It has been supposed by some to be a corruption of *beau jeune*, by others of *bec jaune* (yellow-beak or fledgling). It is connected with two words well known in Mediæval University slang (1.) Beanus, defined in an acrostic, Beanus Est Animal Nesciens Vitam Studosiorum, and (2.) Bejaunium (Bejaune) "quod a novis scholaribus nomine jucundi adventus a condiscipulis exigebatur," see Ducange, *Glossarium*.

[2] The Regents were sometimes reckoned as five at the time by including the Master of Humanity.

that heirafter sall capesse this our charge that thereby they may be induced to stay the longer therein, that an proportion of the first and second Regents above the rest be in all tyme coming retained. And further, in respect what rent hes beine befoir possessed or is now by his Majestie designed is not such a competence of meanes as may encourage us to remain theirin, and not mak it an interim for a further vocatioune. We humbly intreat and represent that if the rents and burthens of the Colledge can suffer so much yet further may be appointed as may be thought expedient."

This overture was allowed by the Commissioners, but the hopes of the Regents for larger salaries must have been dashed by the qualification that if it were found, after the trial of the rents, that the augmentation could not be got, there was to be a proportionate reduction.[1] The stipends were afterwards raised, but not till 1649, after Stair had ceased to be Regent, when they were fixed at 500 merks and 50 merks in addition to the eldest.

The Visitors' Acts on the occasion of this visitation afford some interesting glimpses of the Regent's duties and the course of study then pursued at Glasgow. The Dean of Faculty was enjoined to see to it "that the Regents be short in their nots," a rule which Law's notes show Stair faithfully obeyed, and to which we may perhaps attribute the conciseness that marks his Decisions and Institutions. "The former lessoune was to be examined before the next was taught," and "the Greek text of Aristotle analysed *viva voce,* and thereafter the summe of the text writtine;" every scholar was to have Aristotle's text in Greek. The practice of disputation, so characteristic of the mediæval university, and the effects of which both for good and evil are traceable in every speech and writing of the Scotchmen of this age,[2] was preserved. It was ordained "that the dis-

[1] Munimenta, ii. 408.

[2] And indeed of other ages. Franklin says of one who was a Scotchman, a university man, and a lawyer, that he had the right on three grounds to be disputatious.—Franklin's *Autobiography.*

putes among the schollers continue as they now are in these classes and in the public scholls, and that a way to stir up emulatione in studies betwixt classes be thought upon as the Facultie sall think convenient in theses, themes, disputes, declamations, and otherways." There was to be a public examination at the commencement of the Session on 1st of October, and before the vacation which began on 1st of June. Each scholar was to have a bible and to speak Latin under a penalty, to wear a gown, to practise lawful games, as golf, archery, and the like, but to abstain from cards and dice.[1]

The Regents at this time besides Stair were David Forsyth, David Dickson, David Munro, and William Semple. Munro had the Magistrand or senior, and Stair the Bajan or junior, class. Dickson was Professor of Divinity, Munro of Philosophy, and Forsyth of Logic. Semple is sometimes called Master of the Grammar.[2] Mr. Robert Maine was Professor of Medicine. It was significant of the period that the Commissioners, while they resolved that the Professorship of Medicine was not necessary (though Maine was to hold it during his time[3]), a new Professorship of Divinity, of which there were already two teachers, the Principal, and David Dickson—was most necessary. To this new Chair Robert Baillie, then minister of Kilwinning, in Ayrshire, was called; and in the various steps of his disputed settlement Stair, as Regent, concurred. Baillie had been nominated by the General Assembly at St. Andrews in 1641, but the Earl of Eglinton, his patron, and his Presbytery and congregation interposed difficulties, and the Principal and Regents, including Stair, addressed him in an urgent

[1] Munimenta, ii. 465.

[2] Baillie's *Letters*, ii. 87. Baillie in this place mentions that three of the Regents, Munro, Forsyth, and Semple, sided with Principal Strang in the College dispute as to the election of a Dean of Faculty and Commissioners to the Assembly "all of his own creation to be employed for anie thing he pleased;" but Stair is not named.

[3] Munimenta, ii. 467.

letter on 28th June 1642, exhorting him to obey the decision of the Assembly. In his answer he states his unwillingness to come, and says: "With the Presbyterie I have some hopes to come speed; with my Lord Eglinton and my people I have as yet none at all; their earnestness to stick by me to the uttermost still continues."[1] He came, however, in the following month, a coolness between him and the Eglinton family —whose eldest son, Lord Montgomery, he had rebuked for excess in drinking, and for leaning to the Marquess of Hamilton —having apparently made him more willing to quit Kilwinning. His discourse on admission, *De Hæreticorum Autocatacrisi*, was delivered on 16th July 1642.

In September 1643, we learn from the University records that Stair, now in his twenty-fourth year, was about to marry; and it being necessary, by the terms of his appointment, that he should resign his office, he did so, but was on the same day re-elected Regent by his colleagues, taking a new and shorter oath, from which the obligation of celibacy and to remain six years Regent were omitted. It may have made the consent of his colleagues easier to obtain, that, in the following year, two of them, Munro and Dickson, followed his example.[2] The wife of Stair was Margaret Ross, elder daughter and co-heiress of James Ross of Balneil, in the parish of Old Luce, in Wigtonshire, the lady round whose memory the superstition and jealousy of her contemporaries and the romantic fiction[3] of Scott have cast a gloom which makes it difficult to discern her true character. She brought him an estate of £500 a year, which, with his own patrimony, must have rendered him independent of the small salary of Regent.[4]

[1] Baillie's *Letters*, ii. 37.

[2] Glasgow was, on this point, two centuries in advance of the English Universities, which have only recently allowed some of their fellows to marry.

[3] *Bride of Lammermoor*, in which Lady Stair is represented by Lady Ashton.

[4] Her sister married, eight years after, Robert Farquhar of Gilmilnscroft,

On the 21st September of the same year he was present at the meeting of the Comitia of the University when the Marquess of Hamilton was elected Chancellor—the first layman who had held that office. In 1644 Stair was sent to Edinburgh to represent the college in a claim to be exempted from excise, which was submitted to the Estates of Parliament. To his zeal in the discharge of this mission, the following letter of Lord Loudon to Principal Strang testifies:[1]—

"REVEREND AND LOVING FRIEND,—The Committee of Estaites having taken to their consideratione your desyres anent the immunitie of your Colledge fra the excise, *representit to thame be the beirar, Mr. James Dalrymple, and pressed hardlie by him aecording to your priviledge*, have condescendit that quhat is spent within the Colledge for thair interteinment sall pay no more; but leist it suld be ane preparative to utheris to sute the lyk immunitie, the Committee wald not condescend to give out any contract or writ heirupon. In the quhilk, or in any uther thing that may concern your good and priviledge of your Colledge, I sall endevor to approve myself

"Yonr loving and faithful friend, LOUDOUN.

"EDINBURGH, 1 *March* 1644."

The last notiee of Stair's name as Regent, which oeeurs in the printed records of the University,[2] is on 27th February 1645, when he was present at a meeting of the Faculty of Arts; but he held office till the close of 1647, and though the date[3] of his resignation is not given, it was probably in October

in Ayrshire. James Dalrymple was one of the witnesses to her marriage-contract, dated 22d September 1651.—Robertson's *Ayrshire Families*, iii. 55. Murray erroneously says this lady married Sir David Dunbar of Mochrum.—*Literary History of Galloway*, p. 128.

[1] Munimenta, i. 29. [2] Munimenta, ii. 310.

[3] Murray, in his *Literary History of Galloway*, p. 127, says: "In the month of April he intimated to the patrons his intention of retiring;" for which he cites a MS. communication from the Records of Glasgow University,

of that year, when a new Regent,[1] Mr. John Kilpatrick, was admitted.

The period of Stair's Regency was one of universal activity in the University. The new generation of Scotch reformers, who were then its rulers, preserved the tradition of their predecessors in their honourable zeal for the higher education both in the grammar schools and the universities. The system of instruction and staff of teachers introduced in Glasgow by the new Erection in 1577 was expanded to suit the advancing knowledge of the new century. The greater part of the buildings of the old College, now exchanged for a still nobler edifice, but which were not unworthy of a modest home of learning, were then in progress, and the valuable library was founded about the same time by the munificence of Zachary Boyd,[2] minister of the Barony, the intimate of Baillie, whose active correspondence with Spang, Scotch minister at Rotterdam, is full of orders of books for the College from the Dutch press, which the talents of its authors and the care of its printers then made the most famous in Europe. The residence of Stair at the University had an important bearing on his future life. His reputation was spread by the students, English and Irish as well as Scotch, who at that time frequented it. One of these, whose name deserves a grateful notice, Mr. John Snell[3] of Uffeton, in Warwickshire, in sending, in 1670, a donation

but I have not found this in the printed Records. I owe to the kindness of Professor W. P. Dickson of that University the following later notice of Stair which occurs in the Minutes of the Faculty of Arts for 8th April 1647 :— "Jacobus Dalrymplins Academiæ moderatores monuit ut de successore sibi mature prospiceretur, nam sibi statutum non ultra kalendas sextilis suo in Academia munere vacare."

[1] Munimenta, iii. 387. Kilpatrick was admitted Regent on 28th October 1647.—MS. Minutes of Faculty of Arts.

[2] In 1671 Boyd was chosen Dean of Faculty, and from that time till his death was almost uninterruptedly an office-bearer in the University.—See Account of Bursaries founded by him—Deeds instituting Bursaries at University of Glasgow, p. 34.

[3] Snell was one of the Novitii in quarta classe in 1644.

to the College, of Bishop Walton's great Bible in the Oriental languages, writes to Principal Baillie :—

"Sir,—My education in that place *under the tutorage of the truly honourable and eminent Sir James Dalrymple*, oblidges me, in gratitude, to wish you prosperitie, that as your religion and great learning, so also your loyaltie, may make you famous to succeeding generations."[1]

Snell styles this Bible the first-fruits of his affection, having probably already contemplated the foundation of the exhibitions to Balliol College, Oxford, which he instituted seven years later.

It was Stair's diligence in representing the University which directed the attention of some of the leading men of the capital to his talents, and his own to the profession of an advocate. In another respect it was an advantage that his University career was prolonged beyond the ordinary term. When he came to write on law he wrote, not as a mere lawyer, but as one who had reasoned and taught in other subjects, especially philosophy,—the best antidote to the narrowness of a profession somewhat apt to absorb its votaries in the study of the meaner side of human nature and the pettier details of life. His mind, as we see it exhibited in his Institutions, never forgot the search for principles which had formed its early training. It is this which constitutes the distinction of that work, making it worthy to be read by the philosophical jurist as well as the Scotch lawyer, and may preserve its fame when Scotch law has become matter only of historical interest.

[1] Deeds instituting Bursaries, p. 92. Snell was born in Scotland, at Colmonell in Ayrshire, but after his education at Glasgow became Clerk to Sir Orlando Bridgman, who appointed him Crier to the Court of Common Pleas, and afterwards Seal Bearer, when Bridgman became Lord Keeper of the Great Seal in 1667. *Ibid.* 296.

CHAPTER III.

1648-1650.

Stair passes as advocate—Sketches of some of his predecessors and contemporaries, Sir James Balfour, Sir Thomas Craig, Sir John Skene, Sir Thomas Hope—The leaders of the bar when Stair passed, Sir Thomas Nicolson, Sir John Gilmour, Sir John Nisbet—Difference in the position of the Scotch advocate and in the state of the Scotch law at that and at the present time—Stair goes to Holland as secretary to the Commission from Parliament to Charles II.—Position of Scotland after death of Charles I.—Proceedings of the Commission—Its failure—Stair appointed a Commissioner for the revision of the laws—The previous attempts with the same object—Second Commission to Charles II. at Breda—Stair again secretary—Its proceedings—Stair returns with the Closed Treaty—Stair meets Charles on his landing—Influence of Stair's visits to Holland—Intimacy between Scotland and Holland since the Reformation—Dutch jurisprudence.

On 17th February 1648 Stair was admitted advocate, having no doubt passed the examination in the Roman civil law which, down to the middle of the following century, formed the ordinary and only honourable mode of entrance to the Scotch bar.[1]

Neither the bench nor the bar was specially distinguished when he joined the ranks of the latter. The eminent lawyers

[1] The civil law thesis required from Intrants to the bar had been introduced before 1619.—See A. S., 12th February 1619, in Hay Campbell's Early Acts of Sederunt, p. 75, where it is printed from Pitmedden's MSS., and see further Faculty Minutes, Adv. Lib., 7th November 1664. As to the extraordinary mode of admission without examination, see A. S., 6th July 1680 and 18th January 1684. An examination in Scotch law was first made imperative in 1750. In 1713 Forbes says, "Advocates are sometimes admitted by a trial in the Scots law, in which case the candidate has no speech to the Lords before his admission, *but admission upon a trial in the civil law is more honourable.*"

of the sixteenth century[1] had passed away ; those of the seventeenth whom Sir George Mackenzie, himself eight years Stair's junior as an advocate, has celebrated, were only rising into fame. A few of these predecessors and elder contemporaries of Stair deserve a passing notice in this place to enable us better to understand the character of the legal corporation at this time, which always exercises a subtle influence on all its members, and to appreciate the relative importance of Stair's work as a lawyer.

Sir James Balfour of Pittendreich, who died in 1583, has left behind him an evil reputation which his credit as a lawyer cannot redeem. His character for legal capacity rests on a solid basis. He was one of the Commissioners appointed in 1566 for the emendation of the laws and their publication in a correct and concise form ; and, though this work was never accomplished, Balfour's labours resulted in the formation of the Collection of Practicks which bears his name, but was not printed till long after his death,[2] and in its present shape has received touches from some later hand. This is the earliest law book still quoted in the Courts, and before the publication of Lord Stair's Institutions was that most frequently referred to.[3] He had the art of acquiring office, and was successively Canon of Flisk, a Lord of Session, one of the first four Commissary Judges, Lord Clerk Register, Prior of Pittenweem, and President of the Court of Session. Knox has branded him as blasphemous without any clear ground ; but of his participa-

[1] The chief lawyers of the sixteenth century had been the Presidents, Henry Sinclair Bishop of Ross, and Reid Bishop of Orkney, the Maitlands of Lethington, father and son, John Sinclair Dean of Restalrig, brother of the President, the collector of the earliest Practicks, Sir James Balfour, Sir Thomas Craig, and Sir John Skene. Of the three last, as coming nearer to the time of Stair and his precursors as writers on law, a notice is given in the text.

[2] The Practicks were first published in 1754 by the Ruddimans with a preface which is anonymous, but was written by Thomas Goodall.

[3] Goodall's Preface to Balfour's Practicks, p. 7.

tion in the murder of Darnley there seems no reasonable doubt, nor of his betrayal of his accomplice, the Regent Morton, which led to the execution of the Regent. His character is thus drawn by Mr. Tytler in dark but not untrue colours in his instructive Life of Craig: "He had served with all parties, had deserted all, yet had profited by all. He had been the partisan of every leader who rose into distinction amid the troubled elements of these times. Almost every one of these eminent statesmen or soldiers he had seen perish by a violent death,—Murray assassinated, Lethington fall by his own hand, Grange by that of the common executioner, Lennox on the field, Morton on the scaffold. Many of these atoned by their death for a life of acknowledged guilt; but theirs was upon the whole consistent guilt. Balfour, on the other hand, acquired amid the circumstances in which he was bred an acuteness in anticipating the changes of party and the probable event of political conspiracy which enabled him rarely to adventure too far, which taught him to avoid alike the determined boldness that brings ruin in the case of failure, and that lukewarm inactivity which ought not to share in the rewards of success."[1]

Of higher reputation than Balfour as a lawyer, and a contrast in the purity of his public life, Sir Thomas Craig, the author of the *Jus Feudale*, written in 1603, but not published till 1654,[2] forty-seven years after his death, was the only

[1] Tytler's *Life of Craig*, pp. 105, 106.

[2] According to Lord Stair, Craig wrote in 1600, but as he was called to the Bar in February 1563 (Tytler, p. 29), and says himself, in his Dedication, "quadraginta annis foro nostro me tradidissem," Mr. Tytler's date, 1603 (Tytler, p. 158), appears the correct one. Stair's view of his work is substantially that of all later authorities. "Our learned countryman, Craig of Rickertoun hath largely and learnedly handled the feudal rights and customs of this and other nations in his book *De Feudis*; and therefore we shall only follow closely what since his time hath been cleared or altered in our feudal rights, which is very much; for he having written in the year 1600, there are since many statutes and variety of cases which did occur and were determined by the Lords, and have been *de recenti* observed as they were done

systematic writer on law in Scotland who preceded Stair. The Practicks of Sinclair, Lethington, Balfour, Wemyss, Colville, Haddington, and Sir Thomas Hope, are compilations merely. Craig's was an original work, and though he disclaims the dangerous merit of novelty, the scope and method of his treatise were his own, and have largely influenced subsequent Scotch law books. This is especially the case in the early chapters where he deals with the origin of law in general, and traces the historical progress of the civil, canon, and feudal laws, and the introduction of the last into Scotland. The censure cast upon his work, that it mixes other feudal laws with Scotch, makes it necessary for the Scotch lawyer to be guarded in its use as an authority, but gives it a place in general as distinguished from municipal jurisprudence, and has procured it alone of Scotch law treatises the honour of being edited by a Continental jurist.[1] Now that feudalism, long since banished from the social system, will soon cease to have any place in

by the most eminent of the Lords and lawyers, as by Haddington, who was President of the Session, and by President Spottiswood and by Dury, who continued in the Session from the year 1621 until his death in the year 1642, and though their decisions have been intermitted since that time till Charles II.'s return, the loss is not great, the times being troublesome, and great alterations of the Lords ; but the decisions of the Lords have been constantly observed since the King's return, by which most of the feudal questions are determined ; and those things which Craig could but conjecture from the nature of the feudal rights, the customs of neighbouring nations, and the opinions of the feudists, are now commonly known, and come to a fixed custom, neither doth he observe any decisions particularly further than his own time in which our feudal customs could be but little determined, seeing the Lords of Session were unstable and ambulatory till the year 1540, in which King James V. did perfect the establishment of the Session in a College of Justice, who at first could not be so fixed and knowing in their forms and customs, and therefore it cannot be thought strange if the feudal customs as they are now settled do much differ from what Craig did observe. He hath indeed very well observed the origin and nature of feudal rights, and the customs of Italy where they began, and of France and England whence they were derived to us, and therefore we shall say little as to them."—Stair, ii. 3. 3.

[1] Mencken published an edition of Craig's *Jus Feudale* at Leipzig in 1716.

the law, the same circumstance affords it a better chance of escaping oblivion. Craig is one of the lawyers whose example deserves to be kept in remembrance as a proof that there is no incompatibility between the cultivation of literature and professional excellence. A good scholar, he used Latin both in prose and verse with facility and elegance, though his poems are not likely to be now read except by the curious.[1] He was never Judge of the Supreme Court, having probably declined the office, but he served with credit as Justice-Depute,[2] and Advocate for the Church, and in civil causes was one of the foremost advocates. Besides his best-known work, he wrote on the Succession to the English Throne against the Jesuit Parsons who supported the Spanish claim in preference to that of James VI.; a treatise of much foresight, on the Union of the Kingdoms, and refuted in his book *De Homagio* with acuteness the assertion, made in the Chronicles of Hollingshead, that Scotland had been an English fief,—a controversy which has been revived in our own day, but has now lost the practical interest which then attached to it.[3]

A contemporary of Craig, and predecessor of Stair, Sir John Skene, Lord Clerk Register, who died in 1611, was the father of the long race of Scotch legal antiquaries, to whom his successors have been somewhat ungrateful. It is true he lacked accuracy, the cardinal virtue in historical research, and the correction of his errors has given much trouble to those who followed in his footsteps; but it was an important step to have first edited those curious treatises, the *Regiam Majestatem* and *Quoniam Attachiamenta*, almost the earliest records of Scottish Law, even though his critical sagacity failed to per-

[1] Craig's principal poems were the *Paraineticon*, addressed to James VI. on his departure from Scotland, and the *Propempticon*, addressed to the eldest son of James Prince Henry.

[2] Tytler, p. 349.

[3] See Freeman's *Historical Essays*, p. 114; the Reign of Edward the Third; and Robertson's *Scotland under her Early Kings*, ii. p. 384.

ceive their English origin.[1] His work, *De Verborum Significatione*, though not always trustworthy, has not yet been superseded by any better glossary of ancient law terms.

Sir Thomas Hope of Craighall, Lord Advocate of Charles I., and the father of three judges,[2] though he did not himself reach the bench, was the most eminent advocate of his time. He died two years before Stair passed for the Bar. His fame does not rest on the Major[3] and Minor Practicks, the former never published, and the latter inferior to similar collections, though containing some useful historical information, so much as on his astuteness as a lawyer and legislator. He was probably the introducer[4] of the irritant and resolutive clauses which were sustained against creditors, as making a valid entail at common law in the case of Viscount Stormonth, and formed the model for the Entail Act of 1685, drawn by Sir George Mackenzie. Another measure which has left as deep traces in Scotch law down to the present time as the law of entail was certainly his handiwork. He was the adviser of Charles I.

[1] Craig detected that the *Regiam Majestatem* was a copy of Glanville's tractate *De legibus et consuetudinibus Angliæ*. It is much to be regretted that he did not fulfil his intention of writing on the subject. "Plura de his quatuor libris et de eis qui subsequuntur speciali opusculo post nostras has de feudis lucubrationes exponam," l. 8. 11, and it was reserved for Mr. John Davidson and Lord Hailes to prove the point. The difference between the two works which their collation in the first volume of the Scotch Acts makes evident, has not yet been sufficiently elucidated. Mr. Robert Campbell has, however, done something towards this in a series of articles contributed to the *Journal of Jurisprudence*.

[2] Lords Kerr, Craighall, and Hopetoun.

[3] There is a MS. of this work in the Glasgow College Library, F. 4. 4.

[4] "But to prevent and remeid them there is a new Form found out which has these two branches, viz., either to make the party contractor of the debt to incur the loss and tinsel of his right, in favour of the next in the tailzie, or to declare all deeds done in prejudice of the tailzie by bond, contract, infeftment, or comprisin, to be null of the law."—Hope, Minor Practicks, p. 144. This decision is now reckoned bad law. "Entails are founded on Statute only. It was the unanimous opinion of the Court in the case of Agnew of Sheuchan, that the case of Stormonth was wrong decided, and that entails had not a foot to stand upon but the Statute 1685."—Lord Meadowbank in

in the famous [1] revocation of all erections of Church lands, teinds, and patronages, made in 1625, which led to the submissions of the Lords of Erection, clergy, burghs, and tacksmen of teinds in 1628, and the decree arbitral of 2d September 1629, ratified by the Acts[2] of 1633, by which the system of valuation and sale of tithes, the corner-stone of the existing teind law, was completed. Hope, like many of the lawyers of the time, was a keen partisan of the Covenant,[3] and to his skill and that of Johnston of Warriston is due the legal form with which that party clothed many of its Acts, perhaps also the legal phraseology in which it expressed some of its doctrines.

The leaders of the Bar, when Stair passed in 1648, were Sir Thomas Nicolson, Sir John Gilmour, and Sir John Nisbet. Nicolson, the rival of Hope, "the only man," according to Burnet,[4] "fit to be set up against the King's advocate," obtained

Macdowal v. *Hamilton*, 2d March 1815, F. C. Stair mentions that Stormonth's case did pass with considerable difficulty, the Court being nearly equally divided. Fountainhall, Historical Notices, 1677, p. 141.—"As to the original of tailzies in Scotland, with clauses irritant in case of contracting debts, or not taking the name, etc., they are very late, the first of them within these sixty or seventy years; what was first in Scotland was the Laird of Calderwood's tailzie of his lands, advised by Sir Thomas Hope."

[1] Hope drew the Summons of Reduction-Improbation of 1626, as to which see Mr. Burton's remarks, *History of Scotland*, vi. 361. Of the series of measures which regulate the commutation of tithes in Scotland, it has been said, with considerable exaggeration, that it "has conferred, and is conferring, upon this kingdom such incalculable benefits as perhaps compensate the temporary evils inflicted upon Scotland by the errors of that unfortunate monarch."

[2] See 1633, c. 14 to 19.

[3] "Many lawyers were of the Covenanters' side, and chiefly the King's Advocate, Sir Thomas Hope, which was one of the greatest troubles the Marquis (Hamilton) met with: for he being a stranger to Scottish law, in which the other was skilled as much as any was, was often at a great loss, for he durst advise with him in nothing, and often the King's Advocate alleged law at the Council Board against what he was pressing."—Burnet's *History of the House of Hamilton*, p. 53.

[4] Burnet's *History of the House of Hamilton*, p. 53.

the epithet of Fulmen Fori, but his vehement style of pleading was relieved by a play of wit; his timid disposition in public affairs confined his distinction to professional success, and though his name occurs in almost all the cases reported by Gibson of Durie, the first Lord Advocate under Charles II., he never held office.

Gilmour,[1] who passed in 1628, was remarked amongst the lawyers of his time for his preference of Scotch to Civil law. That this should be remarkable, was a sign that the municipal law was still in its infancy. He gained credit by his defence of Montrose, when prosecuted by Sir Thomas Hope in 1641, and

[1] Mackenzie's *Characters*, p. 7. "Gilmoriorum senior, sine ullo juris Civilis auxilio, doctissimus raro miraculo dici poterat ingenioque suo praxin Fori Scoticani juri etiam Romano æquabat. Illum jura potius ponere quam de jure respondere diximus eique appropinquabant Clientes tanquam Judici potius quam Advocato. Quasi alter etiam Hercules nodosa et nulla arte perpolita clava adversarios prostravit; sine Rhetorica eloquens, sine Literis doctus. Opposuit ei Providentia Nisbetum, qui summa doctrina consummataque eloquentia causas agebat ut justitiæ scalæ in æquilibrio essent; summa tamen arte semper utens artem suam suspectam reddebat. Quoties ergo conflixerunt penes Gilmorium gloria penes Nisbetum palma fuit, quoniam in hoc plus artis et cultus in illo plus naturæ et virium. Nicolsonius junior eloquio usus est Fanatico non Romano; et hinc concionabatur potius quam orabat: documentum posteris futurus illud ad persuadendum aptius quod seculo licet sordido et judicibus licet hebetioribus placet. Si autem doctus hic orationes posteris transmisisset, Augusti seculum (illi notissimum) imitatus fuisset." There is a curious criticism on this passage in Boswell's Tour to the Hebrides: "Sir George Mackenzie's Works (the folio edition) happened to be in a window in the dining-room (of the Castle of Dunvegan); I asked Dr. Johnson to look at the *Characteres Advocatorum*. He allowed him powers of mind, and that he understood very well what he tells: but said that there was too much declamation, and that the Latin was not correct. He found fault with *appropinquabant* in the character of Gilmour. I tried him with the opposition between *gloria* and *palma* in the comparison between Gilmour and Nisbet, which Hailes in his catalogue of the Lords of Session thinks difficult to be understood. The words are *penes illum gloria penes hunc palma*. In a short account of the Kirk of Scotland, which I published some years ago, I applied these words to the two contending parties, and explained them thus, 'The popular party has most eloquence, Dr. Robertson's party most influence.' I was very desirous to hear Dr. Johnson's explication. *Johnson*—I see no difficulty: Gilmour was admired for his parts; Nisbet carried his cause by his skill in law."—P. 255, ed. 1785.

by his opposition to the doctrine of constructive treason, when sought to be applied to the case of the Earl of Argyle twenty years later. He was Stair's predecessor in the President's Chair, which he occupied from the Restoration till his resignation in 1670.[1]

Nisbet, his chief competitor as an advocate, passed five years after Gilmour, and first distinguished himself as one of the counsel of Lord Balmerino. He became one of the Commissaries of Edinburgh during the Commonwealth, and after the Restoration combined for the last time the offices of Lord Advocate and Lord of Session, being appointed to both in 1664. He was noted for his knowledge of Greek,[2] and in his *Doubts*, which Sir John Stewart, Lord Advocate under Queen Anne, answered, has left a record of his acuteness and of a type of mind which repeats itself in every generation of lawyers. His fame was tarnished, as that of some other advocates has been, by avarice,[3] for which the difficulty of attaining and retaining success and often even a livelihood at the Bar affords some palliation, but no sufficient excuse. The honour of this calling, exposed to peculiar temptations, requires that the love of justice and not of gain should be its ruling aim.

The judges at this period were inferior to the advocates. After the resignation of Lord President Haddington, in 1626, scarcely a name of note occurs in the long catalogue of Lords of Session until Stair's own, unless exceptions are to be made in favour of Sir Robert Spottiswoode, son of the

[1] His Portrait, by Scougal, is in Smith's Iconographia Scotica.

[2] Burnet's *History of His Own Times*, p. 279. He is said to have offered £1000 for a Greek MS., lost when his house was burnt.

[3] Nisbet was dismissed from the office of Lord Advocate, for what Wodrow may well call a "very sordid reason," "having consulted pro et con in the case betwixt the Lord Chancellor and Lord Leven, concerning the entail of the estate of Leven."—Wodrow, ii. 350. It gives a painful idea of the state of the Bar, when such an offence could be committed by one who held that high position.

Archbishop and author of the "Practicks,"[1] whose attachment to the royal cause brought him to the scaffold in 1646, and of Sir Archibald Johnston of Warriston, more famous as a politician and party leader than as a lawyer, who met the same fate for opposite principles, but not with equal fortitude, in 1663.

From these brief notices of the chief lawyers of this period it may be seen how different was the position of a Scotch advocate in the seventeenth from that which he occupies in the nineteenth century. Besides the ordinary practice of the law, if his talents were considerable he was almost of necessity engaged in political contests. But if he played a nobler game, it was with higher stakes. His liberty, and even his life, were often risked; his integrity was subject to severer trials. The works of such of these lawyers as wrote also indicate the comparatively unformed state of the law at this time. In the common law and practice of the court there were only manuscript collections of decisions to guide the lawyer. The statutes had not been long collected and printed. The feudal branch of the law was most matured, owing to the treatise of Craig; but the consistency and arrangement of even this part of Scotch jurisprudence Stair dates from the Restoration.

It has been said that Stair soon obtained extensive practice as a lawyer; but although the reputation he brought with him from Glasgow was doubtless of some service to him, it was rather by procuring for him honourable public employment than early private business. Indeed, the statement which immediately follows the Record of his admission as advocate in the Books of Sederunt precludes the possibility of his having practised much. "The session was interrupted from the last of February 1648 to the first of June 1649 by the troubles of

[1] Spottiswoode's *Practicks* were not published, however, till 1706, by his grandson, John Spottiswoode of that Ilk, advocate.

the country."[1] Before the latter date Stair had gone to Holland as Secretary to the Commission of Parliament sent to treat with Charles II. at the Hague. He was employed in a similar capacity in the following year when he went to Breda. His refusal of the tender imposed by Cromwell in 1654, by which those who took it were bound to be faithful to the Commonwealth of England, without King or House of Lords,[2] excluded him from practice at the Bar until the taking of that oath was dispensed with. The interval between this and his appointment as judge in 1657 was too short to admit of his having conducted many causes, unless the progress of business and the rise of advocates was much more rapid than in modern times.

In order to follow the career of Stair it is now necessary to pass to a wider theatre, and to recur to the course of public affairs, of which from this time forward he ceased to be a mere spectator.

On the 30th January 1649, Charles I. had been beheaded at Whitehall. Whatever shortcomings[3] there may have been in

[1] MS. Books of Sederunt, Register House, Edinburgh.

[2] Stair's Apology, p. 4.

[3] Mr. Carlyle's estimate of these appears just: "The faults or misfortunes of the Scotch people in their Puritan business are many; but, properly, their grand fault is this, that they have produced for it no sufficiently heroic man among them: no man that has an eye to see beyond the letter and the rubric; to discern, across many consecrated rubries of the past, the inarticulate dimness of the present and the future, and dare all perils in the path of that. With Oliver Cromwell born a Scotchman, with a Hero king and a unanimous Hero nation at his back, it might have been far otherwise. With Oliver born Scotch, one sees not but the whole world might have become Puritan—might have struggled yet a long while to fashion itself according to that divine Hebrew gospel, to the exclusion of other gospels not Hebrew, which are also divine, and will have their share of fulfilment here! But of such issue there is no danger. Instead of inspired Oliver, with direct insight and noble daring, we have Argyles, Loudons, and narrow, more or less opaque persons of the pedant species,—Committees of Estates, Committees of Kirks—much tied up in formulas both of them—a bigoted Theocracy without the inspiration, which is a very hopeless phenomenon indeed!"—*Cromwell*, ii. 153.

the leaders of Scotch politics at this time, they were not wanting in prompt decision. The nation, though prepared to assert popular rights and to limit the royal prerogative, especially in matters relating to religion and Church government, was strongly in favour of monarchy in preference to the republic felt to be impending in England. On the 5th of February Charles II. was proclaimed king at the Cross of Edinburgh, but under the reservation, "That before he be admitted to the exercise of his Royall Power, he shall give satisfaction to the kingdom in those things that concern the security of Religion, the union betwixt the kingdoms, and the good and peace of the kingdom according to the Nationall Covenant and the Solemn League and Covenant, for which end we are resolved, with all possible expedition, to make ane humble and earnest address to his Majesty." On 7th February Baillie wrote to his correspondent, Spang, the Scotch minister at Rotterdam:— "Ane act of our lamentable Tragedy being ended, we are entering again upon the scene. Oh, if it might be the Lord's pleasure, to perform more happy and comfortable actions than have appeared these years bygone. To the great joy of all, in the midst of a very great and universal sorrow, we proclaimed, on Monday last, the Prince King of Britain, France, and Ireland. We have sent the bearer, a worthy gentleman, to signifie so much to his Majestie at the Hague. We purpose speedily to send a honorable Commission of all Estates."[1] The bearer of this letter was Sir Joseph Douglas, who arrived at Rotterdam on the 2d of March. On the 6th of that month the Commission was appointed by Parliament, the Commissioners being the Earls of Cassilis and Lothian; the laird of Brodie; and Winram, laird of Libberton, the two last afterwards Judges of the Supreme Court; Sir John Christie; Alexander Jaffray, Burgess and Provost of Aberdeen; and William Glendin-

[1] Baillie's *Letters*, iii. 66.

ning ;[1] but the Commissioners who actually went appear to have been Cassilis, Brodie, Winram, and Jaffray.[2] To this Commission Stair was appointed Secretary.[3]

On Saturday the 17th of March, the Commissioners, who were accompanied by a Commission from the General Assembly, consisting of Robert Blair, Robert Baillie, and James Wood, as ministers, to whom Cassilis and Winram were joined as ruling elders,[4] sailed from Kirkcaldy in John Gillespie's ship,[5] and arrived at Rotterdam on the night of the Thursday following, whence they proceeded next day to Delft, where they remained till Monday, being informed by some of their friends that the King would be occupied with his Easter devotions till the succeeding Tuesday. On the afternoon of that day they had their first audience with Charles, when Cassilis spoke in name of the Parliament, and Baillie of the Kirk.[6] The account of their proceedings may be read at length in the Reports to Parliament and the Assembly, in the Clarendon *State Papers*, the *Letters* of Baillie, and the *Diaries* of Jaffray [7] and Brodie ; but as they have not been described with fulness by any historian,[8] and present a curious picture of a scene in

[1] Baillie's *Letters*, iii. 507. Copy of the Commissions. See also Act. Parl. vi. 400, 435.

[2] Jaffray's *Diary*, p. 54.

[3] In the Accounts of the Treasurer of Excise there is a payment, on 15th March 1649, to Cassilis, of £90 sterling to himself, and £30 to the Secretary ; and on the return of the Commission Stair received a further payment of £478, 6s. 8d. Scots, for the expenses of the Commission generally.

[4] Clarendon, *State Papers*, iii., App. 85.

[5] Balfour's *Annals*, iii. 392.

[6] Baillie, iii. 86. See Baillie's Speech spoken at the Hague in the King's Bedchamber, Tuesday, 27th March 1649, three o'clock in the afternoon, pp. 84, 85.

[7] Jaffray afterwards became a Quaker, and his *Diary* is more occupied with his religious experiences than political events.

[8] Mr. Burton, their most recent narrator, does not accurately distinguish the two Commissions—that to the Hague in 1649, and that sent to Breda in 1650 (Burton's *History of Scotland*, vii. 261 *et seq.*) ; but there was so much of repetition in the proceedings of the two Commissions, that this is not

which Stair was intimately engaged, we shall give a short abstract of them, as well as of those of the following year.

The chief difficulties in the way of the negotiations were the presence of Montrose at court; the belief, on the part of the king's councillors, that Ireland would be a more favourable stage than Scotland for the recovery of England, and their opposition to the king's acceptance of the Covenant. The tone of the Commissioners was the reverse of conciliatory. "Saving that they bowed their bodies," says Clarendon, "and made low reverences, they appeared more like ambassadors from a free State to an equal ally, than like subjects sent to their own Sovereign."

The Commissioners from Parliament commenced by desiring the removal of James Graham, "who, abandoning the Covenant and despising the Oath of God, did invade his native country, and, with most inhumane and barbarous cruelty, did burn and waste divers parts thereof, and who spilt so much blood of your Majesty's good subjects;" for which crimes he had been forfeited by Parliament and excommunicated by the Kirk.[1] The king's reply was, that he desired to have all the propositions of the Commissioners submitted to him at once.[2] A similar demand had been made by the Commissioners of the Kirk,[3] and both Commissions, by a second paper, repeated their former request, to which the King[4] rejoined, that he insisted on his answer already given, and was resolved not to consider any particular proposition until the whole were laid before him. Upon this the Commissioners of Parliament stated their demands, which were, *First*, That the

wonderful. The general movement of Scotch history at this period, and the interlacing of political and ecclesiastical influences is described with great fidelity and grasp by Mr. Burton.

[1] 27th March 1649. Act. Parl. vi. 453; Clarendon, *State Papers*, ii. 474.

[2] 8th April 1649, N.S. Act. Parl. vi. 453; Clarendon, *State Papers*, ii. 474.

[3] 30th March 1649. Act. Parl. vi. 453; Clarendon, *State Papers*, ii. 474.

[4] 10th April 1649, N.S. Act. Parl. vi. 453; Baillie, iii. 512, 513.

King would, by solemn oath, allow the National Covenant of Scotland and the Solemn League and Covenant of Scotland, England, and Ireland; *Second*, That he would ratify all Acts of Parliament enjoining the Solemn League and Covenant, and establishing Presbyterial government in Scotland, and give his assent to Acts of Parliament enjoining the same in the rest of his dominions; and *Third*, That he would consent that all matters civil be determined by the present and subsequent Parliaments, and all matters ecclesiastical by the ensuing General Assemblies.[1] The Commissioners of the Kirk presented the same requests in a paper in which the ecclesiastical side of the matter was treated in more detail, requiring an assurance under the King's hand and seal, not merely of his acceptance of the two Covenants, but also of the Directory[2] of Worship, Confession of Faith, Catechism, and the Propositions of Presbyterial Government—of all which, as Baillie informs us, they had given the King a copy, "bound together in as handsome a book as we could gett them:"[3] they also demanded that the King should lay aside the use of the Service Book, and conform to the Directory.[4]

The King[5] again pressed for an answer whether they had now disclosed all their demands, and whether they had any propositions to make for the recovery of his right in England, and bringing the murderers of his father to justice. The Commissioners[6] of Parliament replied that these points were already answered by their former papers, as they were ready to make appear by a conference; but Charles, whose conduct throughout indicates the adroitness of the diplomatists in his council,

[1] April $\frac{10.}{20.}$ Clarendon, *State Papers*, ii. 475; Act. Parl. vi. 454.

[2] Baillie, iii. 514. [3] Baillie, iii. 87. [4] Baillie, iii. 514.

[5] April $\frac{12.}{22.}$ Act. Parl. vi. 454.

[6] April $\frac{14.}{24.}$ Act. Parl. vi. 454.

required[1] particular answers, or that it should be made to appear in writing that the former papers contained sufficient answers. The Commissioners thus urged, answered [2] that they had no more demands to make unless commanded by Parliament, that they had no power to recede from any particular proposed, but that the people of Scotland were prepared, if the King granted their just and necessary desires, to do "all that can be desired or expected from loyal subjects to their gracious King," and to contribute to his restoration to the government of his other kingdoms. The King stated that he was not satisfied by this answer, because it did not say they were to propose nothing more, but only that they were not to do it unless commanded, and because it contained no answer on the point of bringing the murderers of his father to justice.[3] The Commissioners replied that they had nothing further to add as to their propositions, and that they had not thought it necessary to multiply words in repeating "their deep sense of that horrid fact against the life of his royal father."[4] More than a fortnight elapsed without any response from the King, and both sets of Commissioners then pressed him for an immediate answer.[5] At last, on 29th May, the King declared himself in an identical answer [6] addressed to both commissions. He promised to maintain the ecclesiastical and civil government of Scotland as settled by law and all Acts of Parliament consented to by his father, when present or represented by authorized commissioners, and particularly the laws concerning the National Covenant, the Confession of Faith,

[1] $\frac{\text{April 30}}{\text{May 10}}$ 1649. Act. Parl. vi. 455. [2] $\frac{\text{April 23}}{\text{May 3}}$ 1649. Act. Parl. vi. 455.
The dates are so given in the Acts of Parliament, vol. vi., but those of the two last papers appear transposed.

[3] 7th May, N.S. Act. Parl. vi. 455. [4] $\frac{\text{April 29.}}{\text{May 9.}}$ Act Parl. vi. 456.

[5] May $\frac{17.}{27.}$ Act. Parl. vi. 456. [6] May $\frac{18.}{28.}$ Baillie, iii. 515, 516.

and Presbyterian government. But he qualified these concessions by observing that as regarded the League and Covenant in England and Ireland, it was not in his power to take any resolution without the consent of their respective Parliaments, and that he was willing to refer the consideration of this and all other English matters to a free Parliament. He further engaged to grant an indemnity to all, except persons guilty of the murder of his father.

The Commissioners of Parliament in their last paper[1] of 1st June expressed their dissatisfaction with this declaration of the King. They observed that it fell short of the concessions of his father at the Isle of Wight, who had promised to confirm the League and Covenant in both kingdoms, and to settle Presbytery and the Directory of Public Worship in England; that the qualification of his assent to the Acts of Parliaments in which the King or his commissioners had been present would render invalid the Acts of the last eight years, and was contrary to the precedents of 1561 and 1640, in the former of which years, Queen Mary, and in the latter Charles I., had confirmed Acts of Parliaments in which they had not been represented. In a separate paper of the same date, they insisted on their first desire for the removal of Montrose, a desire not likely to be complied with, for the King's declaration had, as we learn from an indorsation[2] on Clarendon's copy in his own handwriting, been agreed to after counsel with Lord Montrose. The Commissioners of the Church presented[3] on the following day, a longer and more vehement protest against the King's declaration, especially that part of it in which he refused to recognise the Covenant in England. Charles returned a

[1] $\frac{\text{May } 21}{\text{June } 1}$ 1649. Act. Parl. vi. 458.

[2] Clarendon, *State Papers*, iii. App. 93.

[3] $\frac{\text{May } 23}{\text{June } 2}$ 1649. Baillie, iii. 517.

curt answer to both commissions, in which he expressed himself much dissatisfied with these last papers, but left the door for negotiation still open, while he closed the mouths of the Commissioners by stating his intention to send an express to Scotland. "In the meantime," he concludes, "I expect and require of all my subjects in Scotland such obedience as is due to me, their King, by the laws of God, of nations, and of that kingdom."[1] The Commissioners immediately left without further reply. They landed in Scotland on the 11th of June and presented a full account of their proceedings to Parliament[2] and the Assembly[3] respectively, by whom they were thanked for their diligence. The failure of this mission might have been foreseen. It was scarcely possible that Charles should agree to such terms, while any other hope remained.

On 15th March 1649, just before his departure for Holland, Stair had been named one of a large Commission, consisting chiefly of lawyers, with the Earl of Loudoun, then Lord Chancellor, at their head, which was appointed by Parliament for the revision of the law. The Act[4] appointing the Commission proceeded on the preamble, "that it is most necessary that there be a constant, certain, and known model and frame of law according to equity and justice established by publick authority and published to all his Majesties lieges; that divers of his Majesties progenitors by Acts of Parliament and commissions under the Great Seal of this kingdom, have given warrants, power, and commission to certain persons therein nominated, for revising and considering the Lawes and Acts of Parliament of the kingdome, as well printed as unprinted: the old book of law called *Regiam Majestatem*, and the customs and

[1] Act. Parl. vi. 459.

[2] 14th June 1649. Parliament returns thanks to the commissioners, Act. Parl. vi. 451.

[3] 10th July 1649. The Assembly returns thanks to the commissioners, Baillie, iii. 521.

[4] Act. Parl. vi. 432.

practices of the severall judicatories of the kingdome, as well civill as criminall, and for gathering and collecting general Lawes to have been perpetually and constantly established for administration of justice within the kingdome, which Commissions did never take the wished effect, partly by the over-great and important affairs of the kingdome, and partly in respect of the respective incident troubles of the times." The prior Commissions here referred to were (1.) that of James I., by an Act of whose third Parliament in 1425 it was ordained "that sex wise men and discreete of ilk ane of the three Estaites quhilk knawis the Lawes best sall be chosen (sen fraude and guile aucht to help na man) that sal see and examine the Buiks of Law, that is to say, Regiam Majestatem and Quoniam Attachiamenta, and mend the Lawes that neids mendement;"[1] (2.) that of James III. in 1469, when a project for the "King's lawis, Regiam Majestatem, acts, statutes, and uther bukes to be put in a volume and to be authorizit, and the laif to be destroyit,"[2] was referred to a Commission of four members of each Estate; (3.) that of John Lesley, Bishop of Ross, in 1566, by whose suggestion a Commission was issued by Queen Mary to certain learned, wise, and expert men who best knew the laws—the Chancellor and other Officers of State, Lords of Session and Advocates, "to visie, sycht, and correct the lawis of this Realme made be Her and Her maist nobill progenitouris be the avis of the three Estates in Parliament halden be thame beginnand at the buikis of the law called Regiam Majestatem and Quoniam Attachiamenta and swa consequentlie following be progress of time until the dait of this Commission swa that na utheris bot the saidis lawis sychtit, mendit, and correctit be her saidis traist Counsalouris and Commisaris or ony sax of them conjunctlie, sal be be her privilege imprentit or have place faith or authoritie to be allegit and reheirsit afoir ony of Her Jugeis or Justices quhatsomever." This Commission resulted

[1] 1425, c. 54.

[2] Act. Parl. ii. 97.

in the printed edition of the Statutes from the commencement of James I.'s reign to 1564, but did nothing with regard to the earlier laws. (4.) In 1574, under the Regency of Morton, the Convention of Estates appointed the Chancellor, John Lord Glammis, William Baillie, Lord Provand Lord President of the Court of Session, William Lord Ruthven, and other Lords of Session and Advocates, "to visite the Bukis of the Law, Actes of Parliament, and Decisionis befoir the Sessioun, and draw the form of the body of our lawis alsweill of that quhilk is alreddy statute as thay thingis that were meet and convenient to be statute," "quhairthrow there may be a certaine written law to all our Soverane Lordis, jugis, and ministeris of law to juge and decyde be."[1] The chief superintendence in this Commission was confided to Sir James Balfour of Pittendreich and Sir John Skene, Lord Clerk Register. It fell to the ground when Morton quitted the Regency, but has left its traces in the Practicks of Balfour and the edition of the Early Laws published by Skene in 1607, who was again a member of a renewed Commission appointed by Parliament in 1592.[2] (5.) In 1628 Charles I. granted a Commission, approved by Parliament in 1633, "to reid, recognosce, and consider the haill lawis, statutis, and Actes of Parliament, togider with the customes and consuetudes of the said kingdome quhilk are and have beine observit as lawis within the same either in the civile or criminal judicatoris," "to the effect the samyne may be their allowance, ratificatione, and approbatione, be registrated in the buikis of Parliament and be maid notour, and known to the haill lieges."[3] Of the labours of this Commission all traces have disappeared.

The Commission of which Stair was a member was granted in nearly the same terms with that of Charles I. Power was given

[1] Thomson's Preface to Act. Parl. 24; Hume of Godscroft's *History of House of Douglas*, p. 358.

[2] Thomson's Preface, p. 26.

[3] *Ibid.* p. 29; Act. Parl. v. 46.

to the Commissioners to consider the customs and practices both of civil and criminal courts, and for this purpose "to order the production of all records and registers, together with the old registers of the book called Regiam Majestatem in order that the Commissioners might compile a formal model or frame of a book of just and equitable lawis to be established and authorised by his Majestie and Estates of Parliament, and might abrogate any byegone Acts of Parliament which had fallen into desuetude or become superfluous or unprofitable." The report of the Commission was to be considered and revised by Parliament, and established as a perpetual law in all time coming. Like its predecessors, this Commission proved abortive; it probably never sat and certainly never reported. Yet we cannot refuse our admiration to these far-sighted, if premature, schemes of the Scotch lawyers[1] in the fifteenth and two following centuries. The troubles of the Commonwealth and of the Restoration were not less adverse than those of the preceding period had been to the execution of a work which required an era of peace for its accomplishment. "Silent leges inter arma."

The first half of the eighteenth century had its two rebellions to suppress. The abolition of hereditary jurisdictions and the final settlement of orderly government and law in the outlying Celtic population was for it a difficult work well

[1] Of a similar Commission in 1681, Fountainhall (*Decisions*, i. 155) says: "The Commission for revising the laws, Acts of Parliament, practiques, etc., may be useful *if it takes effect and those conjoined agree or do not weary for want of salary to recompence their pains.* It has been often on foot. See an old one, Act 54, 1425; Act 115, 1487; Item, the antepenult imprinted Act of the Parliament 1587 and the first imprinted Act 1633. *But the most ample and comprehensive of them all is the printed 47th Act of the Parliament held in* 1649. *This is in imitation of Justinian, who employed Tribonian and certain other lawyers to review the books of law in his time, and who compiled from them the Corpus Juris we now use:* Tho' some blame them for destroying the authors from whom they made their collection, yet it cannot be denied there are some of our old Acts scarce worth the reading; but in these days the laws of other nations were but very little more polite."

executed. But the century which succeeded the '45 has no adequate excuse to offer for not undertaking the work of the arrangement of the law, though England and the confused chaos[1] of her laws, to whose indirect but powerful influence the Union subjected Scotland, must bear a portion of the blame. It still remains a problem, the solution of which depends on the statesmen and lawyers now living, whether the nineteenth century will not prove equally impotent.

A conjecture has been hazarded that his appointment on this Commission first led Stair to think of his work on the law of Scotland, his chief title to fame; but of this there is no proof. It certainly, however, shows the high character, while only a lawyer of one year's standing, he held in his profession, and must have induced him to survey in thought the historical progress of the law and the various unsuccessful attempts made for its improvement. The contemplation of past failures to an energetic mind is a spur to future exertions. What parliaments and commissions have attempted in vain has sometimes been the reward of patient and persevering individual effort. But if the thought of arranging the crude mass of Scottish law then entered the mind of Stair, it was thirty years before he brought it to maturity.

In October[2] of this year, Winram, one of the former Commission, who had become a judge of the Court of Session, and was thought by some of his countrymen to aspire to the part of kingmaker Monk afterwards played with more success, was

[1] Yet let me not be supposed to disparage the gain to Scotland from the wealth of English precedents in commercial law and equity. But of its arrangement, one of its own most brilliant ornaments gives this account:—"We seem making no progress whatever towards reducing to any intelligible shape the chaotic mass,—common law, equity law, crown law, statute law, countless reports, countless statutes, interminable treatises,—in which the law of England is by those who know where to look for it, and not always by them, to be found."—(Chief-Justice Cockburn, quoted by Mr. Dudley Field in letter to Californian Law Commission.)

[2] 11th October.—Balfour's *Annals*, iii. 432.

sent by the Parliament to Charles, who was then at Brussels, but does not seem to have met him till December when Charles had removed to Jersey.[1] His fortunes were now at the lowest ebb. He had no money—not even bread, writes Winram,[2] for himself and his servants. Ormonde's Irish expedition had miscarried. Cromwell marched from victory to victory. The Spanish negotiations intrusted to Hyde made no progress. Scotland now seemed his only refuge, and in reply to the letters sent by Winram he wrote to the Parliament[3] requesting that Commissioners might be sent to treat with him at Breda on 15th March, and to the Moderator of the General Assembly entreating him to use his credit with the ministers "to persuade them to a reasonable moderation."[4] With the duplicity of his race he was writing to Montrose, then preparing for an invasion of Scotland, almost at the same moment that the proposed treaty with the Scots was to be no impediment to his proceedings.[5]

In compliance with the request of Charles, the Estates,[6] on 8th March 1650, appointed the Earls of Cassilis and Lothian, Winram and Brodie, Sir John Smith and Alexander Jaffray, as a Commission to repair to the King at Breda, or any place where the Reformed religion was professed. To this Commission, which was almost identical with that of the preceding year, Stair was reappointed secretary. Like the former it was accompanied by a Commission from the Assembly consisting of Mr. John Living-

[1] Letter, Sir J. Berkeley to Hyde, 3d December 1649. Clarendon (*State Papers*, ii. 499) mentions that Winram was then expected at Jersey: "I believe he will think he hath made a good voyage if he escape with a broken pate; the gallants talked, before I came away, of throwing him over the wall."

[2] Letter, Winram to Mr. R. Douglas.—Baillie's *Letters*, iii. 522.

[3] Clarendon, *State Papers*, iii. App. 93. Letters from Charles to Committee of Estates, 11th January, o.s.

[4] Letter, 15th February 1649, Charles II. to Mr. R. Douglas.—Baillie's *Letters*, App. iii. 525.

[5] Clarendon, *State Papers*, iii. App. 94. [6] Baillie's *Letters*, iii. 524

stone, minister of Ancrum, who has left a characteristic account of its proceedings, Mr. James Wood, Professor of Divinity at St. Andrews, and Mr. George Hutcheson, one of the ministers of Edinburgh, with the Earl of Cassilis and Brodie as ruling elders. The Commissioners were from the first divided into opposite camps. Cassilis, Brodie, and Jaffray, with the ministers sent by the Assembly, were against treating without the most stringent pledges by the King to the Covenant. Lothian, Winram, and Smith[1] were ready to be content with more moderate terms—anxious at all hazards to have a king back as head to the government. Stair, it appears, leant to the latter party, and it is probable that his services on this occasion procured him the favour of Charles[2] when after the Restoration it went hard with those who had accepted office under the Commonwealth. The proceedings opened, as in the former mission, by a speech on the part of Cassilis for the Parliament and of Livingstone for the Kirk, and the latter complains that the expressions he wished to use were toned down by the other Commissioners to make his address "more savourie to the King."[3]

The propositions submitted were: *First*, That Charles should subscribe the Covenant and establish Presbyterian government and worship; *Second*, That he should acknowledge the authority of the preceding Sessions of Parliament, and ratify their Acts; and *Third*, That he should put into execution all Acts against the toleration of Popery, and annul all con-

[1] In a petition by Smith to Charles II. after the Restoration, he says: "Your petitioner being in the year 1650 one of the Scots Commissioners that attended your Majesty at Breda, did stretch himself most faithfully in that station to do service to your Majesty, and advanced certain sums of money for the expense of your Majesty's voyage to Scotland, and by public order provided and sent over arms and two vessels laden with oats for your Majesty's army that then lay at Leith."—Lauderdale MSS., British Museum, 13. 233; see Act. Parl. vii. App. 82 and 85.

[2] "The king took particular notice of him," observes the author of *An Impartial Account of some of the Transactions in Scotland.*—See a letter from a Friend, Somers Tracts, Scott's Ed. ii. p. 550.

[3] Livingstone's Life.—Wodrow Society, *Select Lives*, p. 172.

trary treaties.[1] The Commissioners of the Kirk added[2] a protest against the commission granted to Montrose. After these papers were delivered, Lothian, Winram, and Smith went to Brussels and Antwerp, which caused over a week's delay. The King's reply[3] was a request to know if these were the whole proposals of the Commissioners; to which they answered,[4] that these were the substance of all they were desired to tender. The contrast between the Courtiers and the Covenanters must have been striking to an observant eye. The former described[5] the latter as "brazen-faced rebels and barbarous brutes." The Earl of Cassilis openly rebuked the Marquis of Newcastle for swearing, and the Presbyterian ministers were indignant that Charles amused himself, while the negotiations were in progress, with "balling and dancing till near day,"[6] and not less that he still continued the use of the Service Book. Yet necessity united these strange opposites.

The King's reply[7] to the three propositions was a consent to the first and second, and to the third, with the exception of declaring null all treaties with Papists. He promised to take the Covenant as soon as he arrived in Scotland. He demanded, however, at the same time, the full exercise of his royal authority, the security of his person, the restoration of the Lords of the Engagement, a general reconciliation of parties, and the assistance of a Scotch army to recover England. The Commissioners substantially assented to these demands on condition

[1] $\frac{\text{March 25.}}{\text{April 4.}}$ Clarendon, *State Papers*, ii. App. p. 2.

[2] $\frac{\text{March 25.}}{\text{April 4.}}$ Clarendon, *State Papers*, ii. App. p. 53.

[3] April 9. Clarendon, *State Papers*, ii. App. p. 54.

[4] April $\frac{4.}{14.}$ Clarendon, *State Papers*, ii. App. p. 50.

[5] See Letter by R. W. to William Edgeman, April 22, 1650; Clarendon, *State Papers;* Macrae's *Calendar*, p. 52.

[6] Livingstone's *Life*, p. 174.

[7] Clarendon, *State Papers*, ii. App. p. 58 (Note). April 27.

that he accepted the Covenant; and on the 9th of May they addressed to him a formal invitation to come to Scotland. With this paper and the King's consent to the propositions, together forming the closed treaty, Stair was sent back to Scotland, having been, in the opinion of Livingstone, "a little too much forward for that same way of closing the treaty."[1] The Commissioners of the Kirk continued to press Charles to a more decided declaration against Papacy and Prelacy, and remonstrated[2] with him, in strong language, on his continuing the practice of kneeling at the Communion, "which could not fail to provoke the anger of God." The Scotch Parliament was not satisfied with the treaty Stair brought home, and sent new instructions[3] to their Commissioners, requiring them to demand the King's consent to their former propositions without qualification, that he should exclude from his court all persons falling within the first and second Classes of the Acts of 1646 and 1649,[4] and keep out of Scotland the Duke of Hamilton and other specified persons. When these instructions arrived in Holland the Commissioners and the King were on the eve of embarkation for Scotland,[5] but they do not appear to have communicated the new form of the demands of Parliament till they had set sail. While at anchor off Heligoland,[6] on board the ship "Schiedam," these were presented to Charles, who gave a reluctant assent to them; but his subscription to the Covenant was still deferred, and only when at anchor at the mouth of the Spey, on Sabbath morning

[1] Livingstone's *Life*, p. 177.

[2] See these Papers—Clarendon, *State Papers*, ii. App. pp. 62, 63.

[3] 18th May, o.s. Clarendon, *State Papers*, ii. App. p. 59.

[4] These were—"The Act anent the Classes and Degrees of Delinquents not to be processed to death," 8th January 1646, Act. Parl. vi. 203; "The Act of Classes for purging the Judicatories and other places of publick Trust," 23d January 1649, Act. Parl. vi. 352.

[5] Livingstone's *Life*, p. 180 *et seq.*

[6] Clarendon, *State Papers*, ii. App. p. 63. 11th June, o.s. See Macrae's *Calendar*, p. 64, as to mistake in date.

the 23d of June, after a sermon preached by Livingstone,[1] the last step was taken, Charles swore to the Covenant, and landed, to use an expression of the times, a Covenanted king.

Neither the contrition afterwards expressed by Livingstone, Brodie,[2] and Jaffray, for their share in the treaty, nor the scorching contempt of Cromwell, can be deemed misapplied to this transaction. "For the outward part of swearing and subscriving the Covenant," writes the minister of Ancrum, "the King performed anything that could have been required; but it seems to have been the guilt, not of the Commissioners only, but of the whole kingdom, of the State and of the Church, who knew the terms whereupon the State was to admit him to his government, yet without any evidence of ane reall change in his heart, and without forsaking former principles, counsells, and company."

"We did sinfully," confesses Jaffray, "both entangle and engage the nation and ourselves and that poor young prince, to whom we were sent, making him sign and swear a Covenant which we knew from clear and demonstrable reasons that he hated in his heart."[3]

"But that," wrote Cromwell to David Lesley, "under the pretence of the Covenant, mistaken and wrested from the most native intent and equity thereof, a King should be taken in by you to be imposed upon us; and this called 'the cause of God and the kingdom,' and this done upon 'the satisfaction of God's people in both nations,' as is alleged, together with a disowning of Malignants; although he who is the head of them, in whom all their hope and comfort lies, be received, who at this very instant hath a Popish army fighting for and under him in Ireland; hath Prince Rupert, a man who hath had his

[1] Livingstone's *Life*, p. 182: "It was laid on me to preach the next Sabbath, when he should swear it (*i.e.* the Covenant), and to read the National Covenant and the Solemn League and Covenant, and to take his oath."—See also Livingstone's Letter to R. Douglas, p. 259.

[2] See Brodie's *Diary*, p. 189.

[3] Jaffray's *Diary*, p. 55.

hand deep in the blood of many innocent men of England, now in the head of our ships stolen from us upon a Malignant account; hath the French ships, daily making depredations on our coasts, and strong combinations by the Malignants in England, to raise armies in our bowels, by virtue of his commissions, who hath of late issued out very many to that purpose. How the interest you pretend you have received him upon, and the Malignant interests in their ends and consequences centering in this man can be secured, we cannot discern."[1]

On the 20th of May Stair was appointed by the Parliament, along with Sir Arthur Erskine of Scotscraig, to meet the the King and Commissioners at their landing,[2] and probably accompanied him in his progress to Falkland. Before leaving Edinburgh he had been a witness of the gallant end of the chequered life of Montrose,[3] who was executed on the 21st, and carried the news of it to Charles, a tale which must have raised a pang, if sorrow were possible in a heartless breast.[4] Fortunately for himself, Stair had abandoned the military profession, or he might have shared in the disaster of Dunbar (where his colleague Winram met his death), and the final catastrophe of Worcester.

We do not again find any trace of Stair till 1654, but his time was doubtless occupied in the interval in the practice of his profession and in study.

[1] Cromwell to David Lesley, 14th August 1650. From the Camp at Pentland Hills.

[2] Balfour's *Annals*, iv. 18.

[3] "He got some resolution after he came here how to go out of this world," writes Argyle to Lord Lothian, "but nothing at all how to enter another, not so much as once troubling himself to pray at all upon the scaffold, nor saying anything on it that he had not repeated many times when the ministers were with him. For what may concern the public I leave it to the public papers and *Mr. James Dalrymple's relation.*" Note to Kirkton's *History*, p. 124, quoted by Burton, vi. 260.

[4] "He had an appearance of gentleness in his outward deportment. But he seemed to have no bowels, no tenderness in his nature, and in the end of his life he became cruel."—Burnet's *History*, i. p. 612.

These two visits to Holland form an important epoch in his life. That small republic,[1] reared on land won from the sea and the tyrants of Spain, was then earning the honourable character which it shares with Britain of the exile's home. "It was a maxim of long standing amongst us," said their ambassador Birel to Charles II., "not to inquire upon what account strangers came to live in our country, but to receive them all unless they had been concerned in conspiracies against the persons of princes."[2] The Pilgrim Fathers or the Royalist refugees, French Protestants and German Catholics, adherents of Prelacy, Presbytery, and Independency, found an equal welcome on its hospitable soil.[3] Stair himself, in his adversity, was to claim and receive that welcome for which at this time, unconscious of the future, he was making preparations, by learning to know the people, their customs, and perhaps their language. Between the Scotch and the Dutch there had been, since the Reformation, a strong sympathy founded on common religious ideas and reciprocity of trade. At Middleburgh and Campvere[4] there were Scotch settlements with peculiar privileges. At

[1] "Ad Bataviæ oram ex piscatoriis aliquot navigiis nova repente Respublica extulerit caput: quæ armis indies prævalida superiorem pati nec terra velit nec mari jam possit; quæ magnis per oceanum classibus ad remotissimos terrarum tractus colonias invenerit quæ statis apud Principes legationibus mutuisque fœderibus non minorem se Regibus ferens novum sibi in Europa principatum asseruerit." This is the language of the Jesuit Strada, *de Bello Belgico*, liber primus.

[2] Burnet's *History of His Own Times*, i. 81. The rule was more strictly observed than the exception. "I saw," observes Burnet himself, "much peace and quiet in Holland, notwithstanding the diversity of opinions amongst them, which was occasioned by the gentleness of the Government, and the toleration that made all people easy and happy."—i. 207.

[3] As to the British in Holland in 1688, Macaulay says, "the Hague was crowded with British adventurers of all the various parties which the tyranny of James had united in a strange coalition, old Royalists, who had shed their blood for the throne, old agitators of the army of the Parliament, Tories who had been persecuted in the days of the Exclusion Bill, Whigs who had fled to the Continent for their share in the Rye House Plot."—ii. 453.

[4] See Erskine's *Institutes*, i. 4. 34, as to the conservator of the Scotch privileges at Campvere, and the Acts 1503, c. 81, 82; 1579, c. 96, 97.

Rotterdam, Amsterdam, Dort, Leyden, the Hague, and many other places, there were Scotch congregations; the United Provinces had a Scotch brigade of three regiments in their service;[1] Scotch students frequented the Universities of Leyden, Utrecht, and Franeker, where, as in the French Universities of the 16th century and the German of the 19th, the Civil law of Rome had then its best interpreters. Grotius, the greatest name amongst Dutch, perhaps amongst modern European jurists, had died four years before Stair's first visit, but Paul Voet,[2] the father of the more famous John Voet,[3] Vinnius,[4] and Matthæus were then in their prime. The Dutch school of jurisprudence was contrasted for its elegance[5] with the German, and was reckoned the successor of the French in the combination of classical learning with legal talent. Salmasius,[6] one of the best examples of this combination, was engaged during Stair's visits in his *Defensio Regia pro Carolo Primo,* to which Milton replied in his *Defensio pro Populo Anglicano,* which cost the poet[7] his eyesight, and is said, though with doubtful truth, to have shortened the life

[1] Burton's *History*, i. p. 14.

[2] Paul Voet, son of the theologian Gisbert Voet, born 1619, died 1667, was a Professor at Utrecht. His best-known work, *De Statutis et eorum Concursu*, is still referred to occasionally in our Courts on questions of international law.

[3] John Voet, his son, a Professor at Leyden, born 1647, died 1714, was the author of the somewhat verbose but comprehensive work on the Pandects, from which several generations of Scotch lawyers borrowed their quotations from the Roman law.

[4] Vinnius, born 1588, died 1657, published in 1642, at Leyden, his *Commentaries on the Institutes.*

[5] Some good judges in the present day regard the best Dutch writers as better masters of style than the Germans.

Born 1588 at Saumur, studied at Heidelberg, an Advocate at Dijon, and afterwards Professor at Leyden; died 1658.

[7] In his second sonnet to Cyriac Skinner, Milton says, alluding to his own blindness—

> "What supports me, dost thou ask?
> The conscience, Friend, to have lost them overplied
> In liberty's defence—my noble task."

of his adversary. He was visited at Leyden, where he was Professor, by Stair, who must then probably have made the acquaintance of some of the other leaders of the Dutch jurisprudence. However this may be, his Institutions show he carefully studied their writings,[1] and was imbued with their liberal and philosophical spirit, which transmuted the letter of the Roman law, and adapted it to the advancing civilisation and extending commerce of the age. Thus the modern European *Jus Gentium* flowed from Holland by a direct channel into the law of Scotland, and helped, as in the preceding centuries the Canon law had done, to preserve its equitable character, and to make it more cosmopolitan and less insular than that of England.

[1] Of the Dutch jurists Stair quotes by name only Grotius and Gudelinus, but that frequently. The references to Grotius are the following:—Inst. i. 1. 17, Law, a rational discipline; i. 2. 5, Liberty only limited by the rights of others; i. 5. 2, Distinction between pupillarity and minority; i. 7. 2, Obligations arising from rights of property are by tacit consent, an opinion which Stair controverts, alleging that they arise from the will of God; i. 8. 31, Recompence, as to which there is a similar divergence of opinion; i. 10. 31, Necessity of acceptance to make a promise binding; i. 10. 13, Permutative contracts and enorm lesion; ii. 1. 39, Appropriation by accession; iv. 40. 23, Lying to enemies lawful, which Stair denies. Gudelinus, Professor at Louvain, is mentioned in the following passages:—i. 4. 12, Jus mariti Gudelinus sheweth the same to be the condition of the Netherlands, in which they do almost in everything agree with our customs; i. 5. 12, Obligations between parents and children; i. 6. 3, Obligations between tutors and pupils; i. 10. 7, Every paction produces action, contrary to the Roman law rule, "ex nudo pacto non oritur actio;" ii. 4. 18, New investiture on change of vassal.

CHAPTER IV.

1650-1661.

Stair advocate and judge during the Commonwealth—Sketch of influence of Cromwell's government in Scotland—Stair and other advocates refuse to take the Tender—The Tender laid aside—Stair one of Committee for restoration of the Outer House—Death of Sir James Learmonth, Lord Balcomie, one of the Commissioners for the administration of justice—Stair appointed his successor by Monk—His appointment confirmed by Cromwell—His intercourse with the English judges gave him an opportunity of learning English law—Builds the house called General's Entry—His intimacy with Monk, who consults with him before he marches to England—Visits London on accession of Charles II. —Appointed one of the Judges of Court of Session in new nomination—His wife's estate of Carscreoch, in Galloway, his country residence.

THE victory of Worcester, Cromwell's "crowning mercy," on 3d September 1651, the anniversary of Dunbar, settled the Republic as the form of government for England; and the storming of Dundee by Monk, two days before Worcester,[1] had the same result in Scotland, though that general was not idle during the two next years, and had to be sent back in 1654 to complete the work of subjugation.[2] For the latter country at least the new government was one of force,[3] but it

[1] Carlyle's *Cromwell*, ii. 298.

[2] "There rose afterwards rebellion in the Highlands—rebellion of Glencairn, rebellion of Middleton, with much moss-trooping and horse-stealing; but Monk, who had now again command there, by energy and vigilance, by patience, punctuality, and slow, methodic strength, put it down, and kept it down. A taciturn man, speaks little, thinks more or less, does whatever is doable here or elsewhere."—Carlyle's *Cromwell*, ii. 299.

[3] May 1652. "Letters that the declaration of the Parliament of England for the union of Scotland with England, and the sending of members to the Parliament of England, was proclaimed with great solemnity at Edinburgh Cross; *but the Scots showed no rejoicing at it.*"—Whitelocke's *Memorials*, p. 532. "So remarkable was our loyalty," writes Sir George Mackenzie, "in the world and amongst strangers, that his Majesty was always called

was force in the main guided by wisdom. In all departments of public affairs there was vigour and the spirit of reform. "There was good justice done," says Burnet, "and vice was suppressed and punished, so that we always reckon those eight years of usurpation a time of great peace and prosperity." "Cromwell," observes Sir Walter Scott, with characteristic candour, "certainly did much to civilize Scotland."[1] An incorporating union between the two countries was devised, though not fully perfected. The Parliament of Scotland ceased to meet, and during the short time during which Cromwell tolerated a Parliament in England, Scotland was nominally represented in it by thirty members.[2] A council, which sat at Dalkeith, presided over by Lord Broghill, formed the executive; but all matters of importance were referred to Cromwell himself.[3] Free trade and an improved Postal system[4] between the two countries were established. The Universities were visited,[5]

King of Scots; and it was believed and presumed, in all places where our natives travelled, whether in England or beyond sea, that a Scot was still a Royalist."—*History*, p. 22.

[1] Notes to Dryden's *Heroic Stanzas*—the passage continues: "Some of his benefits were intentionally conferred, others flowed indirectly from tho measures he adopted for the consolidation of his own authority. *The English judges whom he appointed introduced into the administration of justice a purity and vigour with which Scotland had been hitherto unacquainted.* By the impoverishment, exile, and annihilation of the principal baronial families, the chain of feudal bondage was lightened upon the peasantry, and the pay of 18,000 men, levied to maintain the constituted authorities, enriched the lower orders amongst whom it was spent. The English soldiers also introduced into Scotland some of the arts of a more civilized country." So Boswell writes in the *Tour to the Hebrides*, p. 85: "Dr. Johnson laughed to hear that Cromwell's soldiers taught the Aberdeen people to make shoes and stockings and to plant cabbages."

[2] Ordinance of the Protector, 1654.

[3] Lord Broghill's Council was not appointed till 1655, but there had been a prior Commission sent by the English Parliament in 1652, of the proceedings of which Lamont gives a concise account in his *Diary*, p. 37. Amongst these he mentions that "they discharged all judicatories, viz., Lords of Session and Counsell, Shyrra Courts and Commissary Courts," and that "they established a judicatorie of Scquestration at Leith, viz., Mr. Saltonstall and Mr. Disbourg."

[4] Ordinance of the Protector, 17th December 1655; quoted by Burton, vii. 320.

[5] Lamont's *Diary*, Sept. 1652, p. 47.

and grants were given them from the Church revenues. The General Assembly of the Church, which had become far too powerful to co-exist with a settled civil government, was dissolved.[1] The Church judicatories were reorganized, and the excesses of the clergy kept in check by the strict enforcement of the jurisdiction of the Civil Court as to the recovery of stipends. The system of Patronage, which had been restored to the congregations in 1649, and caused hot disputes between the parties of the Resolutioners and Remonstrants, was altered and intrusted to a Commission of forty ministers and twenty elders.[2]

In no department was the reform more radical than in the administration of justice. The Court of Session had never been popular.[3] Its judges were accused, with good cause, of arbitrariness, partiality, and bribery, and crimes of deeper dye had in some cases disgraced the judicial office. A separate Supreme Court for Scotland was still retained, but its constitution and procedure were completely changed. The Court of Session sat for the last time on 28th February 1650, and on 18th May 1652 Commissioners for the administration of justice were appointed under the Great Seal of the Commonwealth. Instead of fifteen Judges or Ordinary Lords, including the President, the number of which the Court had consisted since its institution in 1532 by James v. on the model of the Parliament of Paris, seven Judges were appointed, four of whom

[1] Baillie's *Letters*, iii. 225 ; Lamont's *Diary*, p. 57.

[2] Lamont's *Diary*, p. 92.

[3] Laing, *History of Scotland*, i. 446 and 522, where he quotes Buchanan and Johnston. The former writing in 1582 says, "Nam cum in Scotia nullæ pene sint leges præter conventuum decreta, eaque plera non in perpetuum sed in tempus facta, judicesque quod in se est lationem legum impediant omnium civium bona quindecim hominum arbitrio sunt commissa quibus et perpetua est potestas et imperium plane tyrannicum quippe quorum arbitria sola sunt pro legibus."—Buchanan. *Hist.*, Lib. xiv. 273. The latter writes in 1597, "Hac tempestate totus ordo judicum paucorum improbitate et audacia infamatus. Inveteravit tum opinio et omnium sermone percrebuit pecuniosum hominem neminem potuisse causa cadere."—Johnston. *Hist.*, p. 231.

were English lawyers.[1] There was no President, each Judge taking the chair weekly in rotation. The Extraordinary Lords,[2] whose votes had sustained the influence of the Crown and the Nobility, disappeared. The Outer House, in which the Judges sat singly by turns, was suppressed, and all causes were heard at once by the Court itself. Feudal tenure and its concomitant, the hereditary jurisdictions, were abolished,[3] and regular circuits of the Supreme Judges

[1] The four English were Moseley, March, Owen, and Smyth, and their Scotch colleagues, Sir John Hope of Craighall, son of Sir Thomas Hope, the Lord Advocate of Charles I., Colonel William Lockhart, brother of Sir George Lockhart, President of the Court of Session under Charles II., and John Swinton of Swinton.

[2] The existence of these Extraordinary Lords was one of the marks of the descent of the Court of Session from the Domini Auditores, a Committee of Parliament, and their position may be compared to that of the lay lords of the English House of Lords, who, down to the time of O'Connell's trial, used to sit and sometimes vote in the Court of Appeal. They were reintroduced at the Restoration, but abolished in 1723, by 10 Geo. I. c. 19.

[3] "That all and every the heritors and others the persons aforesaid and heirs are and shall be for ever hereafter freed and discharged of and from all suits and appearing at or in any of their lords' or superiors' Courts of Justiciary, regality, stewartry, barony, bailiary, heritable sheriffships, heritable admiralty, and all which, together with all other offices heritable and for life, are hereby abolished and taken away; and that all and every the persons aforesaid and their heirs are and shall be for ever hereafter freed and discharged of and from all their military service and personal attendance before any of their lords or superiors in expeditions or in travels, and of all casualties of ward lands formerly held of the king and other superiors, and of the marriage, single and double avail thereof, non-entries, compositions for entries, and of all rights and casualties payable, if they be demanded only or upon the committing of any clause irritant, and that the said heritors and persons aforesaid be now and from henceforth construed, reputed, adjudged, and declared free and acquitted thereof."—Ordinance of the Protector quoted by Burton, vi. 318, from Bruce's *Report on the Union*, p. 59. The former vassals were to hold "by and under such yearly rents, boons, and annual services as are mentioned and due by any deeds, patents, charters, or infeoffments now in being of the respective lands therein expressed or by virtue thereof enjoyed, without rendering, doing, or performing any other duty, vassalage, or command whatsoever." More than two centuries have passed, and every one is now satisfied of the necessity of this reform, but the statesmen and lawyers who have lived in the interval have not yet been able to place in the Statute-book what Cromwell accomplished by this single ordinance.

held.[1] The use of Latin in legal writings was done away.[2] New instructions were issued for Justices of the Peace,[3] an

[1] "September 1652. That the new Judges made and sent from England went the circuites in Scotland."—Whitelocke's *Memorials*, p. 543.

[2] "They (*i.e.* the English Judges) discharged any Latin charter to be written hereafter or any Latin words to be in bonds or obligations, bot everything to be in English."—Lamont's *Diary*, 42. See as to changes made in writs, Nicol's *Diary*, 94, 96. So also in England an Act was passed in 1650 "for turning all books of law into English, and for all processes and proceedings in Courts of law to be in English."—Whitelocke's *Memorials*, p. 477. There had not been wanting Scotch reformers of an earlier age who had struggled for the introduction of the vulgar tongue in legal proceedings. Thus Sir David Lyndsay writes in his *Dialog betwix Experience and ane Courteour* :—

"I wald sum Prince of gret discretioun
In vulgare language planelye gart translate
The needful Lawis of this Regioun ;
Than wald thare nocht be half so gret debait
Amang us peple of the law estait
Geve every man the verytie did knaw
We nedit nocht to treit thir Men of law.
Tyll do our nychtbour wrang we wald be war
Gyf we did feir the lawis punysment
Thare wald nocht be sic brawling at the bar
Nor men of law loup to sic royall rent
And ilk man do as he wald be done to
The Jugis wald get lytill thing to do.
. . . . . .
Lat doctores wrytt thaire curious questionis
And argumentis sawin full of sophistrye
Thare Logick and thare heych opinionis
Thare dirk jugementis of Astronomye
Thare Medecyne and thare Philosophye
Lat Poetis schaw thare glorious ingyne
As ever thay pleis in Greek or in Latyne
Bot let us haif the Bukis necessare
To commoun weill and our salvatioun
Justlye translatit in our toung vulgaire."

[3] The Declaration and Order of His Highness's Council in Scotland requiring all Persons to give due obedience to the Justices of Peace in execution of the powers and authorities given them by the instructions hereunto annexed issued in 1655, are printed in Hutcheson's *Justice of the Peace*, App. i. No. 8. In the previous year a new jurisdiction of Courts Baron had been created. "1654, *May*.—Ther was a paper emitted by the forsaid Protector and his Counsell for erecting Courts Baron in Scot-

office introduced by James VI. from England for the administration of minor cases of criminal and civil justice, but which before this time had not taken firm root in Scotland. A stringent Act was passed for the suppression of theft upon the Borders of England and Scotland, the discovery of highwaymen and other felons.[1]

The design of these changes was obviously to hasten that assimilation of the laws of the two countries which was necessary to make the Union complete. But due allowance had not been made for the conservative force of legal institutions and the power of resistance possessed by the legal corporation.

In 1654 all the most eminent advocates, including Stair, refused the Tender or Oath of Allegiance to the Commonwealth and Abjuration of Royalty, and withdrew from the bar. A tradition has been often repeated that a consequence of this was the introduction of the voluminous written pleadings, necessary, it was said, to instruct the English Judges ignorant of Scotch law, which down to a very recent period were an evil characteristic of Scotch procedure,[2] these being drawn at home by the advocates who had seceded, and signed by their less able and more complying brethren. Probably this is an error. Long written papers, both in criminal and civil suits, were certainly in use before this period, and the few reported decisions of the English Judges are creditable specimens of reasoning

land to be holden every three weecks, which Court sould have powir, order, and jurisdiction of all contracts, debts, promises, and trespasses whatsoever arising within ther onne precincts and bounds, provided that the meates in demande exceide not the value of fourtie sh. sterling."—Lamont's *Diary*, 71. What the constitution of these Courts precisely was is obscure, but it appears improbable that they had anything but the name in common with the old Courts of barons and freeholders, as to which see Stair, Inst. ii. 3. 63.

[1] Adv. Libr. H. 33, c.

[2] It has been remarked with reference to this that Scotch lawyers wrote all they spoke, and printed all they wrote. A defender of the old system of written pleadings might retaliate that legal learning is not so thorough or exact since they have gone into disuse, and that much which is now spoken no one would venture to write, still less to print.

and knowledge of the law. The uprightness of these Judges was universally acknowledged,[1] and was the occasion of the shameless saying, attributed to one of their successors after the Restoration, who, being reproached with the difference between their administration of justice and that of the Scotch Judges, replied, "De'il thank them, a wheen kinless loons."[2] This secession of the advocates, indeed, did not last sufficiently long to have had much influence on legal proceedings. The assistance of the bar was found indispensable as on a subsequent occasion, when Stair took a more prominent part on the opposite side, and the Tender had to be laid aside.[3]

Soon after their return to practice the advocates appointed a committee of four, of whom Stair was one, to declare to the Judges that they were in favour of the restoration of the ancient form of the Outer House,[4] and in consequence of these remonstrances that House was re-established[5] in 1655, and has existed ever since. It is curious that the abolition of the Outer House, a cardinal point in Cromwell's changes, is considered by some persons[6] of authority at the present day as now necessary for the reform of the Court.

[1] "And to speik trueth the Englisches wer more indulgent and mercifill to the Scottis nor wer the Scottis to thair ain countrymen and nychtbouris as wes too evident, and thair justice exceided the Scots in many things as wes reputed."—Nicol's *Diary*, 104.

[2] This saying has been attributed both to President Gilmour (*Court of Session Garland*, Ed. 1839, p. 4), and to Dalrymple, President of the Court of Session (Godwin's *History of the Commonwealth*, iii. 314). Whether Stair or his son Hugh, who succeeded him as President, is intended does not appear. Both accounts are of course purely traditional. Godwin says he got his "from a Scotch gentleman whom it would do me honour to name. But I refrain from motives of delicacy."

[3] Stair's *Apology*, p. 4.

[4] Forbes's Preface, p. 31.

[5] "When a good correspondence betwixt the bench and the bar was begun, the Outer House was restored upon an address to that end made to the Commissioners by the Faculty of Advocates, 4th July 1655."—Forbes's Preface, p. 16.

[6] Lord Justice-Clerk Moncreiff.—Scotch Law Commission, Fourth Report, p. 45. Sir Roundell Palmer, *ibidem*.

On 26th June 1657 Sir James Learmonth, Lord Balcomie,[1] who had been appointed little more than eighteen months previously one of the Commissioners for the administration of justice owing to the pressure of business in the Outer House, died on the Bench, an event which the superstition of the times deemed a national judgment.[2] It had been already in contemplation to appoint a new judge, and Monk had, three days before Balcomie's death, pressed the claims of Stair in the following letter to the Protector: "May it please your Highnesse, having received this inclosed letter from my Lord Brodie in answer to your Highnesse's offer to him to bee a judge, and perceiving he is not free to it, *I make bold to mention to your Highnesse one Mr. James Dalrymple as a person fit to be a judge, being a very honest man, a good lawyer, and one of considerable estate. There is scaree a Scotchman or Englishman who hath bin much in Scotland butt knows him, of whom your Highnesse may inquire further concerning him.*"[3] Balcomie's death and the state of business in the Court rendered it necessary that a successor should be at once appointed, and accordingly, on the afternoon of the day of his death, the Council of Scotland filled the vacancy by raising Stair to the bench, and Monk wrote to Cromwell informing him of what had been

[1] "Upon the death of Lord Balcomie, the Council of State, finding the Court of Session weak and wanting one of their quorum *by reason of the absence of some attending the Parliament of England in London*, urged Mr. James Dalrymple to take his place, and promised to procure him a patent for bruiking of the place *ad vitam aut culpam.*"—MS. Diary in Wodrow's *Collection*, Advocates' Library.

[2] "A man verie painfull in his office, and willing to despatch business, in this sad time depairted this lyfe even in a moment sitting upon the bench in the Parliament House about nyne in the cloke in the morning to the great grieff of much people. His corps was honourablie buryit in the Church kirkyeard in Edinburgh with such numbers of people as was admirable, and hard murners befoir and following the bier above fyve hundred personis. *His removal fra that bench was esteemed to be a national judgment.*"—Nicol's *Diary*, p. 198.

[3] Thurloe, *State Papers*, vi. 367.

done : " May it please your Highnesse I am appointed by your Highnesse Council here to acquaint your Highnesse that some few weeks since the Lord Southhall, who was one of your Highnesse's Commissioners for the administration of justice in Scotland, having departed this life, and it having pleased God now to take away from us the Lord Balchomie, another of the said Commissioners, who died this forenoone in the house of the Session of the said Commissioners, whereby the number of the said Commissioners is become so few that here are but foure of them now upon the place, which is the least number that can, by their Commissions, act in the Inner House ; and the constitution of that Judicature being such, that in an Outer House, which is still in use for judging of matters not of so great moment or intricacy as that either party concerned would insist upon having the judgment of the Inner House on them, one of the judges would determine and adjudge in many civil causes which did spare much paines to the whole judicature in deciding of causes of lesser importance, and without which proceedings would be too slow. But the death of Lord Balchomie rendering now the keeping of the Inner and Outer House (which is the whole judicature) together, the quorum now left here being barely competent for the Inner House, and it being the time of the Sessions, which continue but for the months of June and July, the next Session not beginning till the 1st of November, and great numbers of people being attending the despatch of their causes there depending, your Highnesse Council have found themselves in a strait, because they apprehended that as it is necessary for the carrying on of justice to the people, another judge should be appointed who is very able in the laws and practice of proceedings here to keep the Outer House, whereas the Lord Balchomie did frequently sit, having been one of the ablest for it : so they would be very unwilling to place any one in such a trust without your Highnesse' express order and appoint-

ment, if the administration of justice, which they are by your Highnesse appointed to see duly administered, could be otherwise effectually proceeded in without intermission; yet believing it to be your Highnesse intention that they should supply such a present exigency in a time so pressing, *they bethought and have pitcht upon a person of eminent abilities, Mr. James Dalrymple, an advocate of whose qualifications and good affections they have ample satisfaction,* to be ane of the said Commissioners for administration of justice, at the same salary which the Lord Balchomy had, being three hundred pounds per annum, according to the establishment of the Scotch judges, of which choice they humbly crave leave to desire your Highnesse approbation." [1]

Stair was accordingly admitted to the bench on 1st July, and his appointment was confirmed by Cromwell on the 26th of the same month.[2] When afterwards assailed for accepting office under the usurper, Stair defended himself, lawyer-like, with a distinction which will scarcely satisfy a sensitive conscience, though it was adopted in similar circumstances by Sir Matthew Hale.[3] "I was made a judge, supposing I would be as acceptable as any, yet I did not embrace it without the approbation of the most eminent of our ministers who were then alive, who did wisely and justly distinguish between the commissions granted by usurpers, which did relate only to the people, and were no less necessary than if they had prohibited baking or brewing but by their warrant, and between those which relate to councils for establishing the usurped power or burdening the people." His appointment afforded a fair shaft to the satirist,—

[1] Thurloe, *State Papers*, vi. 372.

[2] See also Monk to Thurloe, 14th July 1657, "I understand by yours that Mr. Dalrymple's commission will be speedily sent down."—Thurloe, *State Papers*, vi. 402.

[3] Robert Burnet of Crimond, father of the Bishop, on the other hand, had refused to serve under Cromwell.—See Burnet's *History*, i. 137. Brodie, the Commissioner to Holland, also declined.

"Jingo, the taws ! Presto, begon, a mace !
First Nol's just power gave him a Regent's place," [1]

which did not require to be pointed with the venom of a falsehood,—

" He has a turning rota yett unworne
Can his alleadgeance to the *Tender* turn ;"

for he does not appear to have been required to accept the Tender, taking only the oath *De Fideli Administratione Officii.*[2]

Stair is said to have hesitated before accepting the office of judge, not only because of scruples as to serving under the Protector, but also because the moderate stipend of £300 a year was less than his private practice at the bar. The Reports of the Decisions of the English Judges, which commence on 23d November 1655, show that this practice had become considerable, although less than that of Gilmour and the younger Nicolson. The last case in which he is mentioned as pleading was on 16th June 1657.[3]

It was probably an effect of Stair's intercourse with the English judges at the bar and on the bench that his " Institutions " in many places exhibit an acquaintance with the English law which would be creditable to a Scotch lawyer of the present day, and must have been rare in the lawyers of his own time. His tenure of office at this period, however, was very short, for during the two years which intervened between Cromwell's death and the Restoration the Courts were shut,[4] and a new Commission, in which Stair was included, issued in March 1660, did not take effect, as it was not known in whose name to direct their letters, some being for a king, others for the keepers of the liberties of England.[5]

[1] Maidment's *Scotch Pasquils*, p. 180. [2] Forbes's Preface, p. 31.

[3] *Decisions of the English Judges during the Usurpation.* Edinburgh, 1772. [4] Mackenzie's *History*, p. 21.

[5] March 1660. "The Counsell of Estait now sittand in the intervall betwix the twa Parliamentis . . . . appoyntit the personis following to be Judges for administratioun of justice to the pepill in Scotland, in causes criminal and civill, to witt, Edward Moysilie, Henrie Goodzear,

About or shortly before this time Stair built in Edinburgh a house situated in a "court" now called General's Entry, which may still be seen near the junction of Potterrow and Bristo Street. This became his town residence, and he entertained in it General Monk, from whom the Entry perhaps derived its name. It was afterwards inhabited by his grandson John, second Earl of Stair, and has acquired a poetical association as the lodging of the Clarinda of Burns. In Alison Square, a few paces off, Thomas Campbell composed the "Pleasures of Hope."[1] General's Entry is now one of those despised tenements of the old town which will probably soon disappear in the course of its improvement.

Monk is said to have frequently sought the advice of Stair during his residence in Scotland. The terms of his letters to Cromwell certainly show the confidence he reposed in him The day[2] before that on which he commenced his march for England, the 18th November 1659, they had a meeting, when Stair recommended him to call a full and free Parliament.[3] He

Crook, junior, Johnne Henlic, Esquyris, for the English natioun; Sir Johnne Wems, Sir James Hope, *James Dalrymple*, Johnne Scougal of Humbie, James Robertoun, and David Falconer, knychtes and esquires, for the Scottis natioun. The quorum of the saidis judges to be fyve, and that the four Inglische judges and four of the Scottis natioun be particularlie assigned to go zeirlie in Circuit Courts in Scotland. Bot thir ordoris tuik not effect, not knowing in quhois name and authoritie to direct thair warrandis and letters; sum of the pepill being for a king, utheris for the keiparis of the liberty of England, as was in use of befoir quhen Oliver and his line assumed the power and authoritie to thamselffis, and usurped the Crown."—Nicol's *Diary*, p. 278.

[1] Wilson's *Memorials of Edinburgh*, ii. 213. Mr. Wilson conjectures with some probability that the name of General's Entry may have been given from the residence there of the Earl who was made Licutenant-General after Malflaquet, but is generally known by his later rank as Field-Marshal Stair. He mentions two curious ornaments of the house, and a sun-dial at the south-east gable, with the motto "We shall die all," the other a shield, bearing the unusual heraldic device of a monkey, with three stars in chief, and the initials J. D.

[2] "Le 18 Novembre 1659, il donna l'ordre de marche, partit ce même jour en avant de son armée avec son état major et se rendit à Haddington."—Guizot's *Monk*, p. 93.

[3] Forbes's Preface, p. 32.

also urged him to set "the course of justice agoing," a characteristic counsel from one whose chief interest in life was the just administration of the laws. Monk appears to have communicated to Stair the progress of his march. One letter at least, written from Dunstable, was seen by Forbes[1] in the hands of Sir James Dalrymple of Borthwick, Stair's second son.

The intimacy of Stair with Monk is a remarkable episode in his life, and affords considerable light on a side of his character, which must not be overlooked in a fair estimate of it. Neither of them was of the rare stuff of which heroes or martyrs are made. They were both men of that disposition which is called by some cunning or politic, by others cautious and prudent. A settled Government appeared to them, at this juncture, more important than the form of Government, nor did they shrink from such personal advantages as fell to their share for contributing to its establishment. It was their misfortune, as it must sometimes be, of the supporters of monarchy, that the personal character of the monarch was not such as could command respect. So far from being a defender of absolutism, Stair's influence and conduct steadily leant to that limited form of monarchy which has been regarded as an axiom of the British Constitution. "As to the matter of Civil Government," he writes in a remarkable passage of his *Apology*,[2] "since I was capable to consider the same, I have ever been persuaded that it was both against the interest and duty of Kings to use arbitrary government; that both King and subjects had their title and rights by law, and that an equal balance of prerogative and liberty was necessary for the happiness of a Commonwealth."[3]

[1] Forbes's Preface, p. 32,—who says the date of this letter was 27th January $16\frac{59}{60}$. Monk entered London on the 13th February 1660. M. de Bourdeaux to M. de Brienne.—Guizot's *Monk*, p. 273.

[2] *Apology*, p. 4.

[3] A Treatise on the Rights of Kings and Subjects is amongst his lost works. See *Apology*, p. 4.

Although in his[1] dedication of the Institutions to Charles II., there is some of the flattery of the age, it is more sober than that of most of its writers; his refusal of the Declaration in 1663, his exile on account of the Test imposed in 1681, and the part he took in the Revolution of 1688, prove that this declaration against arbitrary government was sincere. It was not wonderful that in the minds of those who had witnessed the troubles of the civil war, and the period which had preceded it, there should arise a horror of bloodshed and desire for peace. "Victor sine sanguine" was the motto which Monk, shrewdly conscious of his best title to honour, assumed, and Stair was specially solicitous to show, and, it will be presently seen, showed successfully, that he discountenanced the severity with which the Government of Charles treated his old associates of the Covenant.

Charles and his ministers were not slow in measures of retaliation. Within a few months Argyle[2] was beheaded and Guthrie hanged.[3] Rutherford's *Lex Rex* was burnt by the hangman, both in Edinburgh and St. Andrews. The inscriptions on the tombs of Alexander Henderson at Edinburgh and George Gillespie at Kirkcaldy were defaced. The corpse of Montrose was disinterred from the Boroughmuir and reburied with great state in St. Giles's. Under the shelter of the Rescissory Act, by which all the Acts of Parliament since

[1] The practice of flattery in dedications was thus defended by one who was certainly as free from it as any English writer: "I do not myself think a man should say in a dedication what he could not say in a history. However, allowance should be made, for there is a great difference. The known style of a dedication is flattery; it professes to flatter. There is the same difference between what a man says in a dedication and what he says in a history, as between a lawyer pleading a cause and reporting it."—Dr. Johnson, in Boswell's *Tour to the Hebrides*, p. 353.

[2] Argyle's execution was on 17th May 1661.

[3] Guthrie was hanged in June 1661. "We saw Argyle and Guthrie, their heads standing on the gates of Tolbooth."—Ray's *Itinerary*, 20th August 1661.

1639 were declared null, Charles broke his oath[1] and restored Episcopacy. Yet the Government took credit, and perhaps, considering the times, deserved some, for its clemency.

Soon after Charles's accession, Stair went to London[2] with Lord Cassilis, one of his companions in Holland, to pay his respects to the King, by whom he was received with favour, knighted, and appointed one of the judges of the Court of Session, in the new nomination on 13th February 1661.[3] The Earl of Glencairn was made Chancellor of Scotland, and in his absence Sir John Gilmour was appointed to act as President of the Court.[4] Sir George Mackenzie mentions that, "in the nomination of the College of Justice, each great man was allowed a friend or two, till the list was compleat;" but Stair probably owed his place to the personal favour of the King.[5]

[1] When the Scotch records were returned to Edinburgh after the Restoration, "it was suggested to Clarendon that the original Covenant, signed by the King, and some other declarations under his hand, were among them, and he, apprehending that at some time or other an ill use might be made of these, would not suffer them to be shipped till they were visited, nor would he take Primrose's promise of searching for them carefully and sending them up to him. So he ordered a search to be made. None of the papers he looked for were found."—Burnet's *History of His Own Times.* Eighty-five hogsheads of the Scotch registers were lost on their way to Scotland by the shipwreck of the vessel in which they were conveyed.

[2] This was in the end of May or beginning of June 1660. Lord Lorne writes to Lauderdale on 24th May: "I am now resolved, almost with all Scotland, to seek the satisfaction to kiss his Majesties hand. No man in this country so old, or sulky, or sullen, or peevish, but is making ready. The Earl of Cassilis is on Monday next to be at the first meeting of a shire, ... and it is believed from that he sets forward."—Lauderdale MSS. in British Museum, 21. 37.

[3] Act. Parl. vii. 124. He took the oath of allegiance on 5th April.—Act. Parl. vii. App. 33.

[4] Thirteen of the new judges were knighted; only two, Mr. Robert Burnet and Mr. James Robertson, "renuncit the order of knighthood." "All these foirnamed persones," Nicol observes, "were able judicious men." —Nicol's *Diary*, 355.

[5] "And I know that the King allowed *his friends* to accept such Commissioners as were necessary for preserving his people, and *therefore when he was restored I was one of the senators of the College of Justice in the first nomination.*"—*Apology*, p. 4.

In November of the same year, Gilmour having been called to London to advise as to the marriage articles between Monmouth and the Duchess of Buccleuch, Stair was named by the Earl of Middleton, the King's Commissioner, Vice-President, to take the Chair during his absence.[1]

He was also put on the new Commission[2] for the Plantation of Kirks and Teinds, and on that for raising the King's Annuity in the shire of Wigton,[3] where his wife's estate of Carescreoch was situated. Stair rebuilt, about this time, the mansion-house on that property, which became his favourite residence, retreating to it whenever relieved from the business of the Court, and employing himself actively in the management,[4] both of that and his paternal Ayrshire estate. This combination of the country gentleman and the lawyer was long a distinguishing mark of the Scotch judges,[5] several of whom did much for the improvement of agriculture. Their descendants still own a considerable portion of the soil of Scotland.

[1] Forbes's Preface, p. 32.

[2] 4th March 1661 ; Act. Parl. vii. 48.

[3] 29th March 1661 ; Act. Parl. vii. 92. On 5th July 1661 ; (Act. Parl. vii. 295.) He was also appointed one of the Commissioners for ascertaining the losses and annual rents of James Duke of Hamilton and others.

[4] *Statistical Account of Scotland*, Wigtonshire, p. 70.

[5] Lord Kames was the most notable of these, but he is by no means a solitary example.

CHAPTER V.

1661-1671.

Stair Judge of Court of Session—Government of Scotland under Charles II.—The Royal Prerogative restored—First the Earl of Middleton, and afterwards the Earl of Lauderdale, at the head of Scotch affairs—Stair deprived of office for refusing the Declaration, but restored by Charles—Visit to Paris—Created a Baronet—Tragedy of his daughter, Janet Dalrymple, the Bride of Lammermoor—Different and inconsistent versions of the story—Other superstitious stories about members of Stair's family—One of the Scotch Commissioners to treat of the Union—Failure of this project—On the resignation of Sir John Gilmour, appointed President of the Court of Session—Sir George Mackenzie's character of him—Made a member of the Privy Council of Scotland.

THE next ten years of the life of Stair, although marked by a domestic tragedy, were not memorable as regards public affairs. Scotland had now resumed a secondary position, and a Judge, though not entirely removed as now from politics, was chiefly occupied with the discharge of the duties of his office. The joy with which the Scotch nation hailed the Restoration, its hopes of freedom and independent government, were quickly dispelled. If the rule of Cromwell[1] had been galling to the feelings of a proud people, and in some respects

[1] Cromwell himself had seen the position with a clear eye. He thus describes the condition of the Scotch: "In good earnest I do think the Scots nation have been under as great a suffering in point of livelihood and subsistence outwardly as any people I have yet named to you. I do think truly they are a very ruined nation. And yet in a way (I have spoken with some gentlemen come from thence) hopeful enough; it hath pleased God to give that plentiful encouragement to the meaner sort in Scotland,—I must say, if it please God, to encourage the meaner sort. *The meaner sort live as well and are as likely to come into as thriving a condition under your government as when they were under their own great Lords who made them work for their living no better than the peasants in France.*"—Cromwell's Speech to the English Parliament, 25th January 1658.

in fact severe, that of their own impoverished and intriguing statesmen, with first Middleton, and afterwards Lauderdale, at their head, was much more so.

The first Session of the first Parliament of Charles II. was chiefly occupied in restoring the Royal Prerogative in all the plenitude of the times of his father and grandfather. An oath was imposed on Members of Parliament, by which they acknowledged that the King was supreme governor of the kingdom over all persons and in all causes,[1] implying his supremacy in ecclesiastical as well as civil matters. The appointment of Officers of State,[2] the calling, holding, proroguing, and dissolving Parliaments,[3] and the right to make peace and war,[4] were declared to belong to the Royal Prerogative. All Leagues and Conventions without the King's authority were pronounced null.[5] The Convention of 1648[6] and the Parliament of 1649 were condemned, and the Covenant asserted to be not binding. All persons in office were to take the oath of allegiance and in addition an oath acknowledging the Royal Prerogative.[7] The famous Rescissory Act[8] annulled the Acts of all the Parliaments since 1640, but judicial proceedings during the Usurpation were saved unless impugned within a year.[9] Church government by presbyteries and synods was allowed in the meantime, but warned of its impending

[1] 1661, c. 2; Act. Parl. vii. 7.
[2] 1661, c. 2; Act. Parl. vii. 10.
[3] 1661, c. 3; Act. Parl. vii. 10.
[4] 1661, c. 5; Act. Parl. vii. 13.
[5] 1661, c. 4; Act. Parl. vii. 12.
[6] 1661, c. 6; Act. Parl. vii. 16.
[7] 1661, c. 9; Act. Parl. vii. 30.
[8] 1661, c. 15; Act. Parl. vii. 86. The preamble of this Act should be read as the best exposition of the abject spirit of the time of the Restoration. Its enacting clause is: "Therefore the King's Majesty and Estates of Parliament do hereby rescind and annull the pretended Parliaments kept in the year one thousand six hundred and forty, one thousand six hundred and forty-one, one thousand six hundred and forty-four, one thousand six hundred and forty-five, one thousand six hundred and forty-six, one thousand six hundred and forty-seven, and one thousand six hundred and forty-eight, and all acts and deeds past and done in them, and declares the same to be henceforth void and null."
[9] 1661, c. 12; Act. Parl. vii. 62.

fate by the same Act[1] which declared that his Majesty would make it his care to settle and secure the Church in such a form as should be most suitable to God's Word, *monarchical government*, and the public peace.[2] There could be little doubt what this meant in the mouth of the descendant of the author of the famous saying, "No King no Bishop," and who himself declared that Presbyterianism was not a religion for a gentleman. A solemn anniversary was ordered yearly on the 29th of May, the birthday of Charles[3] and the day of his Restoration.

In August of this year, Lauderdale, who was Secretary of State for Scotland in London, an office which gave him the King's ear,[4] wrote at the command of Charles to the Scotch Privy Council stating the royal intention to restore Episcopacy, and accordingly by the first Act of the Parliament of 1662 the former government of the Church by archbishops and bishops was re-established.[5] The Covenant and Solemn League and Covenant were declared unlawful oaths, and all persons speaking or publishing against the King's supremacy in matters ecclesiastical incapacitated from public office.[6] A Declaration that it was unlawful for subjects to enter into Leagues and Covenants was imposed not merely on persons in office, but also upon advocates—a measure which even Sir George Mackenzie, a strong upholder of the Royal Prerogative, disapproved, remarking that advocates, not being persons in public trust, by the same rule the declaration should have been forced upon all the nation.[7]

During these two years the government in Scotland had been in the hands of the Earl of Middleton, a soldier of for-

[1] 1661, c. 16; Act. Parl. vii. 87. [2] 1661, c. 16; Act. Parl. vii. 88.

[3] Charles was born 29th May 1630, and entered London 29th May 1660, but the Acts of his reign are dated from the day of his father's death.

[4] "That my Lord Lauderdale is never from the King's eare nor council, and that he is a most cunning fellow."—Pepys's *Diary*, 2d March 1663-4.

[5] 1662, c. 1; Act. Parl. vii. 372: Act for the restitution and re-establishment of the antient Government of the Church by Archbishops and Bishops.

[6] 1662, c. 2; Act. Parl. vii. 377. [7] Mackenzie's *History*, p. 65.

tune[1] who had first distinguished himself in the service of the English Parliament, but had afterwards done good service both for Charles I. and Charles II., and shared the exile of the latter. At the Restoration he was created Earl,[2] made Commander-in-Chief in Scotland, Governor of Edinburgh Castle, and represented the King as Commissioner in the Parliaments of 1661 and 1662. A devotee of arbitrary government without political tact, he forgot this meant the will of the King and not his own, and by the rash attempt to incapacitate his rival Lauderdale in the Act of Billeting, under which Lauderdale, the Earl of Crawford, and Sir Robert Murray were named by secret voting amongst the twelve persons excluded from the Act of Indemnity, procured his own fall.[3]

Charles as in several other cases held an audience,[4] and after a debate in which Middleton and Lauderdale incriminated each other, decided as a personal monarch who should rule Scotland. Middleton was dismissed from all his offices, and the dissipated Earl of Rothes[5] sent as Commissioner in his room,[6] but the real power was vested in Lauderdale[7] who remained in London as Secretary of State for Scotland. This

[1] "A man of moderate understanding, not covetous, but a soldier of fortune and poor."—Pepys's *Diary*, 15th April 1667.

[2] Crawford's *Peerage*, 332 *et seq.*

[3] The Act of Indemnity is 1662, c. 10; but the twelve persons were excepted from it by two separate Acts which were entitled the Act for excepting of Persons from Public Trust, and the Act for Voting the same by Billets, both of which were rescinded by the King's command in 1663; Act, 9th September 1663, Act. Parl. vii. 471.

[4] Mackenzie's *History*, p. 73. Brown, *Miscellanea Aulica.*

[5] There are some curious letters from him to Lauderdale, defending himself against charges of drunkenness and horse-racing, amongst the Lauderdale MSS.

[6] Sir James Turner's *Memoirs*, p. 136.

[7] "That my Lord Lauderdale, being Middleton's enemy and one that scorns the Chancellor, even to open affronts before the King, hath got the whole power of Scotland into his hand; whereas the other day he was in a fair way to have had his whole estate and honour and life voted away from him."—Conversation of Mr. Alsopp, the King's brewer, with S. Pepys, 22d February 1663-4.

clever and even learned, but unscrupulous and coarse statesman has left the impress of his character on the dismal page of Scotch history which is filled with the sufferings of the Covenanters during the next twenty years. Had Charles sooner listened to the complaints of his opponents, and dismissed him from the management of Scotch business, the fate of the Stuart race might possibly have been averted for a time. It required a long course of misgovernment to alienate the Scotch people from their hereditary kings.[1] By an Act[2] passed on the 7th of August, the Declaration was re-enacted in Scotland, and the oath ordered to be immediately taken. All persons in public trust were required to declare that they "judged it unlawful to subjects, upon pretence of reformation or other pretence, to enter into Leagues or Covenants, or to take up arms against the King or those commissioned by him, and that all the gatherings, convocations, petitions, protestations, and erecting and keeping of council tables that were used in the beginning and for carrying on the late troubles, were unlawful and seditious; and, particularly, that the oaths, whereof the one was commonly called the National Covenant and the other a Solemn League and Covenant, were and are unlawful oaths, and were taken by and imposed upon the subjects of this kingdom against its fundamental laws and liberties." The King, by a letter on 19th December 1662, ordered the Lords of Session who[3] had not yet taken it to do so within a fixed date.

[1] "No part, I believe, of modern history can be compared, for the wickedness of government, to the Scots administration of this reign, . . . the tyranny of Lauderdale far exceeding that of Middleton as his own fell short of the Duke of York's."—Hallam's *Constitutional History*, iii. 328. "The Parliament of 1661," observes the same writer, p. 327, "influenced by wicked statesman-lawyers, left far behind the royalist Commons of London, and rescinded as null the entire Acts of 1641 on the absurd pretext that the late King had passed them through force. The Scots Constitution fell back at once to a state little better than despotism."

[2] Act. Parl. vii. 472. 7th August 1663; 1663, c. 3.

[3] Brodie's *Diary*, 10th Nov. 1662, "That Lee, Stair, and Arniston refused the Declaration."

Stair and some of his colleagues had refused to take it in the previous year. He was at this time absent at the funeral of his mother, who had the good fortune to witness his prosperity and to die before the troubles of his later years. He did not take his seat on the bench during the winter session of 1663, and had been present for the last time at a special meeting of the Court called during the preceding vacation in September, when the Lords gave their consent to the purchase by the Magistrates of Edinburgh from Lord Lauderdale of the Citadel of Leith, which had been recently erected into a regality in his favour; this consent being necessary, as part of the revenues of the Court was secured on the money which the Magistrates wished to apply for the purchase. On the 5th January 1664, the King's letter ordering the declaration to be taken by the recusant Lords was read by the Chancellor to the Court, which ordered letters to be written to those of their body who still held out, Lords Arniston,[1] Stair, Bedlay, and Tarbet; and Lord Glencairn as Chancellor wrote to Stair that if he did not come in and take the Declaration before the 19th of January, his seat would be declared vacant. He replied in the following letter to the Chancellor that his resignation was already in the King's hands :—

"Air, *January 15th*, 1664.[2]

"My Lord,—Your Lordships of the 5th instant I receaved this day shewing that his Majestie, by his letter under his royall hand of the 19th December last, had requyred your Lordship to appoint a day in which the absent Lords of Session may either subscrybe the declaration or refuse it, to

[1] Lord Arniston made a reply similar to that of Stair, and was like him deposed. Lord Bedlay pleaded ill-health, and was allowed longer time, but died in the spring following. Lord Tarbet urged that he had already taken the oath in Parliament, and his colleagues were apparently willing to accept this excuse, but a special letter from the King ordered his deposition for the part he had taken in the Act of Billeting, and his place was declared vacant 16th February 1664.—MS. Books of Sederunt, Register House, Edinburgh.

[2] MS. Books of Sederunt, 1661-74.

the end his Majestie may take care for supplying the place of such as sould refuse, and therefore that your Lordships had assigned the 19th of this instant for me to give my ansyre thereanent. My Lord, I have alreadye, before the date of his Ma^ties^ letter, sent up to London a resignatione of my place in the Sessione in his Majesties royall hand, whereby I hope your Lordship and the rest of the Lords will be satisfied that I need not come to give any further ansyre to your Lordships letter. I sall not cease qll I breath to be faithfull to his Ma^tie^ and to doe him all service I can in whatever statione I be in, and sall be readie to doe what service I can to your Lordship and that honourable House which I soe much love and honour as you sall be pleased to command.—My Lord, your Lordships most obedient humble Servant, JA. DALRYMPLE."

His place was accordingly declared vacant four days after.[1] This act showed courage, for he risked by it more than his seat on the Bench, but Charles summoned him to London, and allowed him to take the declaration with a qualification[2] that he was content to declare against whatever was opposite to his Majesty's right and prerogative, giving him a writing to that effect.[3]

[1] MS. Books of Sederunt, 19th January 1664, Register House, Edinburgh. This evening, writes William Sharpe to Lauderdale, "the President calls me, and tells me that after consideration had of Stairs letter to the Lords this day, they had declared his place vaking."—Lauderdale Papers, British Museum.

[2] "But when the Declaration was enacted by Parliament, required of all in public trust, I did rather renounce my place than take it, and did retire into the country, where I lived a year privately and quietly; but without any desire and expectation, King Charles called me to London, and desired me to return to my status in the Session, and when I told him I could not sign the Declaration unless it were so explicated and restricted that by the general terms expressed in it I did declare against no more than what was opposite to his Majesty's right and prerogative, and that I should have these terms from his Majesty in writing, which he granted, and I have yet to show which the Act of Sederunt at my restitution doth import."—*Apology*, p. 4.

[3] In an obscure passage William Sharpe writes to Lauderdale on 16th April

Accordingly a royal letter was addressed by the King to the Court in the following terms:—

"Right trustie and Right well-beloved Cousins and Counsellors, Right trustie and well-beloved Counsellors and trustie and well-beloved: wee greete you weill. Having heard Sir James Dalrymple of Staires, one of your number, clear himself in the matter of the declaratione appointed to be taken be all in public trust (which he at his return will take), and being well satisfied therewith, and with his good affection to our service, and with his great abilities to serve in that station. We did not think fit to accept of the warrant formerly sent us for demitting his place into our hands (of which demission no use has been maid), therefore our pleasure is that he, signing the said declaration, doe continue in his place as one of the ordinary Lords of Sessione in the same manner as formerly, and as if the warrant for his demission had never been maid, and so we bid you fareweil. Given at our Court of Whythall, the 21st day of Apryll 1664, and our reign the 16th year. By his Ma^ties^ command, sic subscribitur Lauderdail."

In compliance with this letter, he was readmitted, and the Act of 19th January declaring his place vacant rescinded. Immediately after receiving the King's letter he made a short tour to France[1] with his eldest son, the Master of Stair, and

1664:—"Mr. Hastie, his cousin, here says, that my Master, his little elder" (this is said to refer to William, Master of Craufurd, afterwards eighteenth Earl), "has writ here of late in French *that Stair, who is now with my Master, was called from this upon the express condition that neither Sheldon nor the Black Lawyer* (the Chancellor, Lord Glencairn, or Sir John Gilmour, President), *should know of it. So that some think my Master intends to bring him off without doing what others have done, but neither of the two . . . will be well pleased if he be not neighbourlike.*"—Lauderdale Papers, British Museum, 37. 116.

"We are told now," writes Archbishop Sharpe to Lauderdale on 21st April, "*that Stair is sent for to be dispensed with as to his taking the Declaration,* and that the eyes of our adversaries are much upon him, but I think he is more wise than to put himself in a singular condition."—Lauderdale Papers, British Museum.

[1] From a letter by Stair to the Earl of Argyle, written from Paris, which belonged to Mr. Thomas Thomson, and was seen by Dr. Irving (see his *Life of Stair*, p. 157), it appears Stair left London on 22d, and arrived in Paris 29th April 1664. This letter, it is to be hoped, is still extant, but though I have made inquiry I have not discovered it.

visited Paris. The satirist alludes to this in some obscure lines—

> "He sware and O rare keept three
> Kingdoms quat (*i.e.*, quitted)
> For France two months before he
> Would do that,"

which are explained by their Jacobite annotator Robert Mylne, "that he had sworn that he would rather goe to France than take the Declaration."[1] It seems more probable that he was anxious to see the magnificent capital and brilliant Court of Louis XIV., who then attracted the admiration of Europe, and gratified the pride of France, but is now seen to have sown the seeds of its decay. He resumed his seat[2] on his return on 9th June 1664. A week before, he had received a further mark of the royal favour, being created a baronet.

During the next five years there is nothing of moment to relate in the life of Stair.

The few memorable events in Scotch history during this period were the institution of the Court of Ecclesiastical Commission at the instigation of Sharpe, Archbishop of St. Andrews, in 1664, who seemed to emulate the fame of the Star Chamber and of Laud; the exaction of severe fines and quarterings in the western shires by Sir James Turner, the rising of the Covenanters, which was suppressed by the "Muscovite"[3] General Dalzell at the Pentland Hills, in 1666, the appearance for a brief interval of a milder administration under the influence of Lord Tweeddale and Sir Robert Murray, shown by the trial and dismissal of Turner, the indulgences to the outed ministers, granted by Lauderdale, and the accommodation or comprehension, unsuccessfully attempted by the saintly Bishop Leighton.[4] In

[1] Maidment's *Scotch Pasquils*, p. 180.

[2] MS. Books of Sederunt, 1661-74, Register House, Edinburgh.

[3] Dalzell and General Drummond, afterwards Lord Strathallan, had been recalled from the Russian service by Charles.

[4] Leighton's attempt at a comprehension came to a point in 1670, but he had been preparing the way for it before. "He went round some parts of country," writes Burnet, "to the most eminent of the indulged ministers,

English history these were the *anni mirabiles* of the Plague, the Dutch war, the Fire of London, and the Triple Alliance.

Towards the close of 1669, the family of Stair was saddened by the tragedy which "the Bride of Lammermoor" has made familiar to many to whom his name would otherwise be unknown. Lord Macaulay has adopted this story in one of those brilliant passages which, unfortunately for his future fame as an exact historian, will not bear examination. Selecting from every quarter the blackest colours to paint the character of Stair, the father of the man destined to be the scapegoat of William III. for the massacre of Glencoe, he says, "One of his daughters had poniarded[1] her bridegroom on her wedding night." The suggestion conveyed in this that a daughter of

and carried me with him. His business was to persuade them to hearken to propositions of peace. He told them some of them would be quickly sent for to Edinburgh, where these would be offered to them in order to the making up our differences: all was sincerely meant. They would meet with no artifices, no hardships; and if they received those offers heartily, they would be turned into laws, and all the vacancies in the Church would be filled by their brethren. They received those offers with so much indifference, or rather neglect, that would have cooled any zeal that was less warm and less active than that good man's was. They were scarce civil, and did not so much as thank him for his tenderness and care. The more artful among them, such as Hutcheson, said it was a thing of general concern, and they were but single men. Others were more metaphysical, and entertained us with some poor arguings and distinctions. Leighton began to lose heart. Yet he resolved to set the negotiation afoot, and carry it as far as he could. When Lord Lauderdale came down to hold a Session of Parliament, letters were writ to some of the Presbyterian preachers, ordering them to come to town. There was a long conference between Leighton and them before the Earls of Lauderdale, Rothes, Tweedale, and Kincardine. Sharp would not be present at it, but he ordered Paterson, afterwards Archbishop of Glasgow, to hear all, and to bring him an account of what passed." The account of the conference, and of the subsequent one at Paisley, is very interesting, but too long to transcribe here. The result was the rejection of the overtures by the Presbyterians, which was to be expected, as Episcopacy was an essential part of them.—Burnet's *History*, i. 296 *et seq.*

[1] Macaulay's "poniard" is probably borrowed from Scott's fiction: "The fatal weapon was found in the chamber smeared with blood. It was the same *poniard* which Henry should have worn on the wedding day."—*Bride of Lammermoor;* Waverley Novels, Ed. 1830, xiv. p. 355.

Stair murdered her husband is certainly untrue, for Dunbar of Baldoon, who is here referred to, and who was married[1] to Janet Dalrymple on 12th August 1669, died from an accidental fall off his horse between Holyrood House and Leith on 28th March 1682.[2] What germ of truth there is in the traditions which have come down to us chiefly from the fierce antagonists of the Dalrymples concerning this lady, it is much more difficult to determine. The Reverend Robert Law, minister of Inchinnan, Stair's old pupil, whose *Memorials* are a strange record of the superstitions of the times, relates amongst his many stories of ghosts, witches, and their supernatural doings that "The President had a daughter before this time, being married, the night she was bride in, was taken from her bridegroom and harled through the house [by spirits we are given to understand], and soon afterwards died." In this, the earliest edition of the story, there is no poniard and no violence used by the lady. Mr. Kirkpatrick Sharpe, the Jacobite editor of Law's book, gives two versions of the story without stating the authority for them, which contradict each other in the material point who was the actor in the tragedy. According to the first of these, "Lady Stair, who did not approve of her daughter's choice of a husband, after a vain opposition, told her, 'Weel, ye may marry him, but sair shall ye repent it,' and accordingly on the bridal evening, after Lady Stair herself had locked the door of the chamber where the young couple lay, and carried away the key, a precaution usual at that time, in order to prevent numberless coarse jokes meditated by the marriage guests, most dismal shrieks and groans were heard to issue from the bedroom which alarmed every member of the household; the key was immediately called for, and it is alleged

[1] "Nupta August 12, Domum Ducta August 24, Obiit September 12, Sepulta September 30, 1669." Such is the short but perhaps only trustworthy record of this tragedy.

[2] "At the Quarrel Holes, near Edinburgh."—R. Mylne's Note to Pasquil on the Stair Family, Maidment's *Scottish Pasquils*, p. 198.

Lady Stair relinquished it with remarkable unwillingness and delay. When the door was opened a shocking spectacle presented itself. The young lady, weltering in her blood, lay extended upon the bed, and her husband, in a state of idiocy, was seated in the chimney, glaring with his eyes and laughing in a hideous manner."[1]

In this account, it will be noticed, it was Stair's daughter and not her husband who suffered the injury on the fatal night, which agrees with the fact of her untimely death, little more than a fortnight after marriage. The second account reverses the parts, and relates how, "after she retired with the bridegroom into the nuptial chamber, the door being locked, she attacked him furiously with a knife, and wounded him severely, before any one could gain admittance. When the door was broken open, the youth was found half dead upon the floor, and his wife in a state of the wildest madness, exclaiming 'Take up your bonnie bridegroom.' It is added that she never recovered her senses, and that her husband, who recovered of his wounds, would bear no questions on the subject of his marriage, taking even a hint of that nature as a mortal affront to his honour." Yet a third tradition has survived in the Dalrymple family that it was Rutherfurd, the disappointed suitor, who assaulted Dunbar on the wedding night.[2] Nothing less than the agency of the archfiend himself would satisfy the ribald satire of Sir William Hamilton of Whitelaw, who afterwards disgraced the judicial bench, and was the rival of Sir Hew Dalrymple for the office of President on the death of Stair.[3]

[1] Law's *Memorials*, p. 226.

[2] Sir J. H. Elphinstone's letter to Sir J. Stewart Denham, printed in *Bride of Lammermoor*, Abbotsford Edition.

[3] Hamilton suffered more than he inflicted by satire. In one of the few Pasquils which approach to wit he is thus described :—

"Old Nick was in want of a lawyer in hell,
To preside o'er his Court there of Session,
So old Whytlaw he took, for he suited him well
For tyranny, lust, and oppression ;

" Nick did Baldoon's posterior right decide,
And as first substitute did seize the bride;
Whate'er he to his mistress did or said,
He threw the bridegroom from the nuptial bed
Into the chimney, did so his rival maull
His bruised bones ne'er were cured but by the fall."

On the other hand, Andrew Symson, minister of Kirkinner,[1] the historian of Galloway, describes both bride and bridegroom, in verses nearly as bad as Hamilton's satire, as clothed with all the virtues:—

" A virtuous lady, not long since a bride,
Was to a hopeful plant by marriage tied
And brought home hither. We did all rejoice
Even for her sake. But presently our voice
Was turned to mourning for that little time
That she'd enjoy. She waned in her prime,
For Atropos, with her impartial knife,
Soon cut her thread and therewithal her life.
And for the time we may it well remember,
It being in unfortunate September,
Where we must leave her till the resurrection.
'Tis then the saints enjoy their full perfection."

Dunbar was painted in a subsequent elegy as a perfect paragon:—

" His body, though not very large or tall,
Was sprightly active, yea, and strong withal;
His constitution was, if right I have guessed,
Blood mixed with choler, said to be the best;

'Twixt the Devil and Whytlaw, the poor wretches damned
Will be sore put about in that hot land,
For now the fierce Justice-Clerk's got the command
They could hardly be worse off in Scotland."—
Maidment's *Scotch Pasquils*, p. 262.

Sir Walter Scott, by an error which deprives his account of all claim to accuracy in detail, makes Hamilton, who was only called to the Bar in 1664, the rival of Stair himself for the office of President, and not of his son Hew. —Introduction to *Bride of Lammermoor*, p. 247.

[1] Elegy on the unexpected death of the virtuous lady, Mrs. Janet Dalrymple, Lady Baldoon, younger.—Advocates' Library.

In 's gesture, converse, speech, discourse, attire,
He practised that which wise men still admire—
Commend and recommend. 'What 's that?' you 'l say.
'Tis this: He ever choosed the middle way
'Twixt both the extremes. A'most in ev'rything
He did the like, 'tis worth our noticing,
Sparing, yet not a niggard, liberal,
And yet not lavish nor a prodigal,
As knowing when to spend and when to spare,
And that 's a lesson which not many are
Acquainted with. He bashful was, yet daring
When he saw cause, and yet therein but sparing;
Familiar, yet not common, for he knew
To condescend and keep his distance too;
He used, and that most commonly, to go
On foot. I wish that he had still done so.
The affairs of Court were unto him well known,
And yet meanwhile he slighted not his own;
He knew full well how to behave at Court
And yet but seldom did thereto resort,
But loved the country life, choosed to inure
Himself to past'rage and agriculture." [1]

But enough has been quoted of the minister of Kirkinner's panegyric, which seems to have been partly due to Dunbar's attending his church when it was deserted by the rest of his congregation:—

> " So that my muse 'gainst Priscian avers
> He, only he, *were* my parishioners,
> Yea, and my only hearers."

If Symson's sermons were like his poems, attendance on them received an appropriate rccompence in such an elegy.

Scott's account of the story in the Introduction to the *Bride of Lammermoor* and in the novel itself is a compound of the various traditions, the satire, and the elegies, with some

[1] A Funeral Elegie, occasioned by the sad and much-lamented death of that worthy, respected, and very much accomplished gentleman, David Dunbar, younger of Baldone, etc., by Andrew Symson, minister of Kirkinner.—Advocates' Library.

additions received orally from members of the Dalrymple family.[1]

Told by a master of story in a singularly vivid and picturesque manner, it is not wonderful that it has made most impression on the imagination of posterity. While he disclaims the intention of "tracing the portrait of the first Lord Stair in the tricky and mean-spirited Sir William Ashton," and pronounces Stair, "whatever might be his moral qualities, certainly one of the first statesmen and lawyers of the age," he avows that Lady Ashton may be supposed "to possess some resemblance to Dame Margaret Ross."[2]

Out of this strange medley of the falsehood of superstition, the falsehood of satire, the falsehood of flattery, and the more honest fiction of the novelist, who shall reconstruct the facts? Leaving the task to some future Browning, of whom the theme is not unworthy, all that shall here be said is that the unhappy marriage and early death of Janet Dalrymple are ascertained, and that some dispute with regard to who should be her husband is probable.[3]

[1] "A lady, very nearly connected with the family, told the author that she had conversed on the subject with one of the brothers of the bride, a mere lad at the time, who had ridden before his sister to church. He said her hand, which lay on his as she held her arm round his waist, was as cold and damp as marble. But, full of his new dress and the part he acted in the procession, the circumstance, which he long after remembered, with bitter sorrow and compunction, made no impression on him at the time."—Introduction to *Bride of Lammermoor*, p. 243. I have not discovered Scott's source for saying that Lady Stair quoted Numbers xxx. 2-5 to induce her daughter to break her troth to Lord Rutherfurd, the uncle of Dunbar, with whom she is said to have been pre-engaged.

[2] Introduction to *Bride of Lammermoor*, p. 254.

[3] Murray, *Literary History of Galloway*, p. 157, argues that the whole story is a fiction, which "originated in superstitious ignorance or the rancour of personal and political enmity, and has since been illiberally perpetuated by Episcopal and Jacobite writers." He points out "that some passages in Symson's Elegy are inconsistent with it, especially as it says she was brought home to Baldoon's and enjoyed the marriage state for some little time." But I am not able to accept this as a complete explanation.

The tales of witchcraft connected with the Dalrymples were not confined to Janet and her mother.

Another daughter of Stair, who was subject to fits, was believed by the superstitious to have an evil spirit, which gave her power to leap over high walls, or, as the satirist amplifies it:—

> "Who without wings can with her rumple flye,
> No midding foull did ever mount so high,
> Can skip o'er mountains, over steeples soare,
> A way to petticoats ne'er known before;
> Her flights not useless, though she nothing catch,
> She 's good for letters when they need dispatch,
> When doors and windows shut cage her at home
> She 'l play the shuttlecock through all the room.
> This high-flown lady never treads a Stair
> To mount her wyse lord's castles in the air."

This wonderful personage was Sarah Dalrymple, third daughter of Stair and wife of Lord Crichton, eldest son of the Earl of Dumfries.

Nor were his male descendants free from the misfortunes supposed to attend his family, though Satanic influence seems to have been ascribed only to its female members. Besides the accidental shooting of his elder brother by his grandson John, the future Field-Marshal Stair, which the satirist Hamilton does not scruple to magnify into parricide,[1] Burnet, who evidently had no dislike to repeat the scandal of the time to the discredit of Stair, relates that "his eldest son rode over a child and dashed out its brains; and another, being in a fever, snatched at somewhat that lay by him and swallowed it down, which proved to be cantharides for a viscatory plaster, with which he was ulcerated all within, and died in extreme misery. Another of his sons, in a fit, fell into the fire, which burnt out half his face." These childish stories, for which there may or

[1] "Stair's neck, mind, wife, sons, grandson, and the rest,
Are wry, false, witch, peats, parricide, possessed," etc.
Motto to Hamilton's lampoon on Stair Family.

may not have been some foundation in fact, when distorted into signs of the Divine wrath against the family of Stair, are as it were the Nemesis of the Greek tragedy stript of all its dignity, and clothed in the vulgar garb of Scotch superstition of the seventeenth century. It will be necessary to recur to them, and to consider some of the other causes which produced them in connexion with the character of Lady Stair.

In August 1670 Stair was appointed by the King one of the Commissioners of Scotland, under the authority of an Act of Parliament of 30th July 1670,[1] to meet Commissioners of England and treat concerning a union of the two kingdoms.

A more intimate union than the personal union of the crowns, effected by the accession of James VI. to the throne of England in 1603, was no new idea. It had been a favourite project of that monarch,[2] who first suggested the name of Great Britain. It had engaged the comprehensive mind of Bacon.[3] It had been in view in all Cromwell's schemes for the government of Scotland. In 1653 the Protector had summoned Scotch Commissioners to London to treat of a union, and for a short time it had been almost accomplished by the election of Scotch members to sit in the Parliament of England. When after the Restoration the form of government was settled, the scheme was again renewed, it is said, at the suggestion of Lord Tweeddale,[4]

[1] Act. Parl. viii. 6. [2] Burton's *History of Scotland*, vi. 192.

[3] See his *True Greatness of Britain*, published by Stephens, 1634; and his Speech of 17th February 1606-7; Ellis and Spedding's Ed. of Bacon's Works, vii. 39; also his Case of the Post Nati, vii. 637, and Preparations for the Union of the Laws, vii. 727. "Bacon," writes Harrington to Secretary Barlow, "is to manage all the affair [*i.e.* the uniting of the kingdoms], as who can better do these State jobs."—*Nugæ Antiquæ*, i. 353, quoted by Burton, vi. 203.

[4] "Lord Tweedale was then in London, and he set on foot a proposition that came to nothing, but made so much noise, and was of such importance, that it deserves to be enlarged on. It was for the union of both kingdoms. The king liked it, because he reckoned that at least for his time he should be sure of all the members that could be sent up from Scotland. The Duke of Buckingham went in easily to a new thing, and Lord-Keeper Bridgman

and was recommended in Lauderdale's speech to the Parliament of Scotland in 1669. A joint Commission of English and Scotch members was appointed in the following summer, and Stair, with the other Scotch Commissioners, having gone to London, where the negotiations were to be held, on 13th September kissed the king's hand in the withdrawing-room of his bed-chamber, at Whitehall. On the following day the Commissioners for both kingdoms met in the Exchequer Chamber at Westminster, the Archbishop of Canterbury being in the chair, with the Lord-Keeper, Sir Orlando Bridgman, on his right, and the Earl of Lauderdale on his left hand; and the Commissions were read, the Scotch in Latin, conform to the Scotch custom, the English in their own tongue.

The heads for discussion proposed by the king were—

1. The preserving to either kingdom their laws, civil and ecclesiastic, entire.

2. The uniting inseparably of the two kingdoms into one monarchy, under his Majesty, his heirs and successors.

3. The reducing of both Parliaments to one.

4. The stating of all privileges of trade and other advantages.

5. The securing of the conditions of the union.

There were many private meetings of the Scotch Commissioners at the lodgings of the Earl of Rothes and the Earl of Lauderdale. One party, led by Sir John Nisbet, contended there should be no union, because the second and third articles were destructive of the fundamental government of Scotland, —tending to take away the Parliament of that country, which was beyond the power of the Commissioners.[1] Lauderdale and Stair, on the other hand, strongly advocated the scheme for union.

A debate arose on the word "successors" in the second

was much for it. The Lord Lauderdale pressed it vehemently. It made it necessary to hold a Parliament in Scotland, where he intended to be the King's Commissioner."—Burnet's *History*, i. 279, 280.

[1] Mackenzie's *History of Scotland*, p. 199.

article, both as ambiguous in itself, and because by the law of England any usurper coming to the Crown was the King's successor, and in the end that article was carried with the omission of these words. The point was again raised at a meeting of the Joint-Commission, and the article at last voted in the form "that the union was to be in the person of the King and his heirs and the posterity of King James."

The first article as to the preservation of the separate laws of the two kingdoms was next taken up,[1] and the Scotch Commissioners appointed Stair, the Lord Clerk Register, the Lord Advocate, Lord Newbyth, and Sir Robert Sinclair, Dean of the Faculty of Advocates, to consider it.

When the Joint-Commission met on the following day, the report prepared by this Committee was read, and the question of appeals from the Court of Session to Parliament was started. It was objected by the English Commissioners as inconsistent, "that one part of the monarchy should be liable to appeal before Parliament, and the other not liable; the Scottis alleging that their decreets and sentences *in civilibus* were not at all questionable by their law by the Parliament of Scotland." There followed several adjournments, during which the Scotch Commissioners considered the question of appeals, and finally determined "that there could be no appeals from the Council and Session to the Parliament of Great Britain." When the Joint-Commission again met, and before this point had been settled, a more formidable difficulty arose, the Scotch Commissioners insisting that in the united Parliament of Great Britain the existing number of members of the Scotch Parliament[2] should

[1] 27th September, at Lord Lauderdale's; Mackenzie, *History*, p. 203.

[2] The question of the number of members to be sent by Scotland to the Parliament of the United Kingdom had been a rock on which former projects of union had struck; see the remarkable speech of Sir Henry Vane in the Parliament of Richard Cromwell, where he gives an account of what had been done by the Commission sent by Oliver Cromwell to treat with the Scotch, in which he stated "that the Act of Union, in so far as related to representation, had never been duly perfected."—Forster's *Life of Vane*, p. 141.

be preserved. To this the English Commissioners refused their assent; and finally, the Earl of Lauderdale having referred the matter to the King, Charles, on 14th November 1670, "told the Commissioners that in regard of other weighty affairs he had upon him, he thought it not feasible at the time to bring that treaty to a conclusion, but that he would take another time to it."

The negotiations came therefore to an end, and "that grand design," says Sir George Mackenzie, "which had so long exercised the thoughts and entertained the expectations of two kingdoms . . . stopped rather to the wonder than dissatisfaction of both nations."[1]

Stair was not himself destined to live to see the accomplishment of the union of the two countries, but his son, the Master of Stair, was to be a main instrument in carrying the Act of Union through the Parliament of Scotland—a measure which was imperatively required for the further progress of both nations. The share which the Dalrymples took in advocating it was, however, undoubtedly one cause of their subsequent unpopularity in Scotland.

On 22d December 1670, Sir John Gilmour of Craigmillar resigned the office of President of the Court of Session.

The ordinary course of promotion pointed out Sir John Nisbet of Dirleton, then Lord Advocate, as his successor; but he declined it, and Stair was appointed. The royal letter,[2]

[1] Mackenzie, p. 211.

[2] "13th January 1671. The quhilk day the Erle of Rothes, Lord Chancellor, did produce ane letter superscrybed by his Ma^tie^ and directed to the Lord Chancellor, and the Senators of the College of Justice, whereof the tenor follows:—'Charles R. Right trustie and well-beloved Cousins and Counsellors, Right trustie and well-beloved Counsellors, and trustie and well-beloved, we greet you weill. Whereas we granted commission for filling our College of Justice, upon the 13th day of February, in the 13th year of our reigne. And by it we did appoint Sir John Gilmour to be constant President, wherein he has served us faithfully, and whereas, by reason of his infirmitie and weakness, he has humbly and freely resigned his place and charge of President into our hands, to be disposed of as we shall think fitt, and that by a demission signed by him the 22d day of December 1670,

dated 7th January 1671, was read in open Court, having been produced by the Lord Chancellor Rothes on the 13th, when Stair took the oath and his seat. He owed his appointment, according to Mackenzie, to Lauderdale, and this is probable, for that nobleman then dispensed all Scotch patronage.

In connexion with it the same writer gives this estimate of the character of the new President, which is valuable from the many opportunities he had of observing Stair, from whom he differed on many points, and must have watched with that scrutiny which members of the same profession are apt to apply to their brethren:—"And really Stair was a gentleman of an equal wit and universal learning, but most remarkable from being so free from passion that most men thought this equality of spirit a mere hypocrisy in him. This meekness fitted him extremely to be a president, for he thereby received calmly all men's information, and by it he was capable to hear without disorder or confusion what the advocates represented; but that which I admired most in him was that in ten years' intimacy I never heard him speak unkindly of those who had injured him."[1]

Stair was at the same time nominated a member of the Privy Council, as was usual in the case of the President of the Court of Session, and took his seat in that body on 26th January 1671.[2]

therefore, we being confident of the ability, fidelity, and affection to our service of Sir James Dalrymple of Stair, doe nominat and appoint him to be constant President of the College of Justice in absence of our Chancellor, requyring heirby you as Chancellor to take his oath, and that he be admitted in the usuall form, and so we bid you heartily fareweill. Given at our Court at Whythall, the 7th day of January 1671. In the 22d year of our reign. Sic subscribitur by his Ma^ties^ command. LAUDERDAILL."

[1] Mackenzie, *History*, p. 214.

[2] 26th January 1671.—"The said day, Sir James Dalrymple having, in presence of his Majesty's Privy Council, taken the oath of alledgeance and of a Secret Councillor, and signed the declaration anent the Covenant, was admitted and received a member of Councell, conform to his Majestys letter foresaid."—MS. Privy Council Records, Register House, Edinburgh.

CHAPTER VI.

1671-1676.

Stair President of the Court of Session for the first time—A Member of Commission for the Regulation of the Judicatories—Its interim Report in 1670—Secession of the Advocates on account of limitation of their fees—Act of Regulations 1672—Stair Member of Parliament for shire of Wigton and one of Committee of the Articles—Legislation of this year—Act against Conventicles—Powers of Privy Council increased—Acts relating to Private Law—Inventories of Minors' Estates—Summonses—Registration of Deeds—Privilege of Royal Burghs—The Ann—Special Adjudications—Debate before Lauderdale on proposal to abolish Summer Session of the Court—Again Member for Wigtonshire in Parliament of 1673—Incident of the Petition presented by the Women in the Parliament Close—Secession of the Advocates on the question of Appeal to Parliament from Court of Session—Conduct of the leading Advocates and of Stair on this occasion—The three leaders of the Bar at this period, Sir George Lockhart, Sir John Lauder, Sir George Mackenzie.

ALREADY, when one of the ordinary judges, Stair had given proof of his desire for an equal administration of justice by calling all causes in the regular order of their enrolment.[1] The arbitrary power exercised by the judges of following this or not as they pleased had been shamefully abused to favour their friends, both litigants and advocates. He had thus acquired the greatest character for despatch and justice of any man upon the bench.[2]

[1] Forbes's Preface, p. 31.

[2] "And all along, when Lord Stair was a single Lord of Session, and sitting by turns on the Bench in the Outer House, where most of the cases and processes are heard and discussed in the first instance by a single Lord, and where the judges, as to their parts, judgment, justice, or injustice, are mostly known, having none other of the Lords' votes to interfere with their judgment, *he had the greatest character of dispatch and justice of any man that ever sat upon that Bench; all men being desirous to have their cases brought and tried before him.*"—Somers Tracts, Scott's Ed., xi. 550.

The complaints with regard to this and other irregularities in the procedure of the Court were so loud and well-founded, that the King had, on 21st September 1669, nominated a Commission,[1] of which Stair was a member, to consider the whole matter of the Regulations of the three Supreme Courts, which then existed in Scotland—the Session, Justiciary, and Exchequer. The Commissioners reported, in March 1670, certain rules which they recommended for adoption, without prejudice to what, upon further consideration, they should offer as a full settlement; and the King, on the 4th June, ratified their report,[2] and ordered the rules to be observed, and the advocates to swear to them. Amongst the rules was one imposing a limit on advocates' fees, which created the greatest dissatisfaction amongst that body. They refused to swear to the Regulations, and, as they had done in the case of the tender, tried to carry their point by a strike. "They withdrew for two whole months, viz., from 10th of November till January, having just represented to the Lords, in a large speech, that these Regulations were impracticable, and that it was impossible to observe them without the inevitable hazard of perjury."[3] Like many other strikes, this one failed through want of union. The Dean of Faculty, Sinclair, on his return from London, where he had been engaged in the negotiations as to the Treaty of Union, took the oath; a few other advocates followed his example; and the majority, who had themselves, as usually happens in small as well as great revolutions, divided into two parties—a more and less violent one—were compelled to give in.

Stair had opposed this regulation, and had even prophesied to the Commission that the article concerning the lawyers' fees would make all the others ineffectual. For his services to the

[1] *Inst.* iv. 2. 6.—Forbes's Preface, p. 33.

[2] See Act. Parl. viii. 80; 1672, c. 16. Articles for Regulating of the Judicatories, set down by the Commissioners thereto, authorized by his Majesty under the Great Seal. Edinburgh, 1670.—Advocates' Library Pamphlets, 2. 5. 19.

[3] Mackenzie's *History*, p. 216.

Faculty in this matter, and for preventing the distinction between Inner and Outer House advocates, which had prevailed in 1587 and 1604, from being re-introduced, he was publicly thanked by the Faculty.[1] His prophecy was at least partially fulfilled in a way very discreditable to the advocates, who, Mackenzie relates, in order "to render the articles wherein themselves were concerned ridiculous, did exclaim against the whole; and by this practice made the greatest part of them burdens, and unpleasant both to the people and to the Lords themselves, and after this that harmony, which used to be betwixt Lords and advocates, was here broke off."[2] The Commission, however, persevered in its reforms, and, after holding many more sittings, finally reported, in 1672, a series of revised articles, which were embodied by Parliament in the Act concerning the Regulation of the Judicatories, passed on the 30th of August of that year. This Act presents an instructive picture of the evils in the procedure of the Courts it was directed to remedy. Some of its provisions, and in particular those relating to fees, were either evaded or never enforced; others have long since gone into desuetude; but several still remain an integral and important part of the law which regulates the procedure of the Courts of Session and Justiciary.

The first division of the Regulations, which relates to the Court of Session, enacted that books should be kept for the enrolment of processes, which were to be marked of the dates when they were returned by the defenders' advocates, who

[1] Forbes's Preface, 7 and 33.

[2] "The greatest difficulty we have," writes Rothes to Lauderdale, on 17th February 1671, "is to order the fees of the advocates. Many of the Commissioners have been advocates themselves, or their sons are, yet they carry pretty fair, for the point is pressed to purpose; *and if you hear not we order them and the writers, you may conclude that all we have done is not worth two pears (? pence) to the poor harassed country.*"—Lauderdale Papers, Edinburgh College Library. Rothes appears to have had a special ill-will to lawyers. "The Chancellor," says Mackenzie, "dining at Blackbarony's house, did express his dissatisfaction with the Advocate and Register for walking a-foot in the streets, having so considerable an allowance; calling them 'damned Lawyers.'"—*History*, p. 213.

were allowed six days to see them, and that all causes should be called in the order of their enrolment. Careful provisions were made for the keeping both of the Inner and Outer House Rolls and for the publication of the former each Monday on the walls of the Outer House. It was provided that if the pursuer did not insist at the calling of a cause, it should be deleted from the Roll, and protestation—a fine for not proceeding with the case—granted to the defender. The Judges were strictly forbidden to alter the order of the Roll, and if they did so the advocates were to be entitled to decline to plead. The jurisdiction of the Court was excluded, both in the first instance and by way of review—(advocation), and that of the inferior Courts made exclusive in all causes not exceeding the value of 200 merks Scots, not quite £11 sterling,[1] in order that the Lords of Session might be "in better capacity to discuss the processes which come before them, not being overburdened with small and inconsiderable causes."[2] Consignation was introduced in suspensions of decrees in absence of the inferior Courts; suspensions of decrees *in foro* of the Court of Session were prohibited on reasons competent, and omitted or repelled; and a decree *in foro,* as distinguished from a decree in absence of the defender, was defined to be where "there is once compearance for any party and defences proponed," although the advocate should afterwards pass from his appearance. A record of all such decrees was to be kept. Where defences were founded upon writings, these were to be produced along with the defences, and the particular clauses founded on were to be marked, otherwise no respect was to be paid to the allegiances or statements in the pleadings. Sus-

[1] £10, 16s. 8d. sterling. The same limit had been previously fixed for advocation by 1663, c. 9, Act. Parl. vii. 451. The sum was extended to £12 by 20 Geo. II. c. 43, and to £25 by 50 Geo. III. c. 112.

[2] These were the first enactments excluding the jurisdiction of the Supreme Court—a policy which, in the opinion of many competent judges, has since been carried out to an excessive extent; but as regards small-debt causes its wisdom cannot be doubted.

penders were to produce all their verifications [1] at the outgiving of the suspensions, and at the calling of the case, if not produced, decree was to be given against them, but they were allowed to be received on payment of a fine of £12 Scots.

To prevent delay in reductions [2] through ordinary and incident diligences and terms for production, there were in future to be only two diligences against witnesses, one by hornings and the other by caption, and no incident diligence against havers unless it was craved, when the Acts (*i.e.* orders of proof) were to be allowed ; there was to be only one term of production in single (*i.e.* simple) reductions and two in reductions-improbation.[3]

The regulations to which the advocates so strenuously objected followed.

No more than three [4] advocates were to be employed in any cause for a single party, and only two were to be allowed to speak in the Inner House, one after another,[5] upon the same side. The Chancellor or President was to keep the advocates close to the point, and their speeches were limited to half-an-

[1] This prudent provision is frequently evaded in modern practice. It urgently requires to be enforced, and, perhaps, to have added to it a provision requiring affidavits in support of the facts on which suspensions are founded, in order to bring this important branch of the law into a satisfactory condition. It is matter of everyday observation that to get a suspension passed or interim interdict granted or refused strong averments sometimes suffice.

[2] This is the action still in use in Scotland for setting aside deeds on the ground of forgery, fraud, incapacity, etc., and its forms were and still are more cumbrous than those of ordinary actions.

[3] Reductions on the ground of forgery, or those cases in which, by fiction of law, forgery must be alleged.

[4] Although this regulation is not enforced, it has been generally followed in practice, and there are scarcely ever more than three advocates employed in a Court of Session suit, and rarely more than two. In England and Ireland, on the contrary, it appears to be not very uncommon to have three or more counsel on each side.

[5] This is still the practice in the English but has ceased to be so in the Scotch Court, where the advocates on each side are heard alternately.

hour. Their fees were to be according to the quality [1] of the client. The maximum for consultation, pleading, and drawing bills upon any interlocutor was fixed for a nobleman at £18, a knight or baronet at £15, a gentleman or chief burgess at £12, and any other person at £9. For informations after dispute (*i.e.* after the case had been debated), half-fees, and that only to one advocate, were allowed.[2] The parties were to give in a declaration, as they should answer to God, that they had not given larger fees, and every advocate, at his admission, was to swear he would not receive larger. A table of fees was also enacted for Clerks of Session and their servants, and for the Clerk of the Bills and his servants. Certain persons under the names of agents, who were neither advocates nor advocates' servants, having taken upon them to meddle in processes, "who are of no use but burdensome to the lieges," they were prohibited from entering the Parliament House.[3] The Keepers of the General Registers of Hornings, Inhibitions, Interdictions, Sasines, and Reversions, and of the registers in the several shires, were enjoined to be careful in booking these writs, and

[1] The same principle was adopted in the Regulations for Bail under the Act 1701, c. 6, and is characteristic of an aristocratic state of society.

[2] These Regulations with regard to fees were rescinded in 1681.—Act. Parl. viii. 363. Fountainhall, *Decisions*, i. 153.

[3] The ordinary agents in litigation at this time were the advocates' clerks or the advocates themselves, the Scotch custom having followed that of France, where no distinction existed between the counsel and the attorney or solicitor. The Writers to the Signet and Clerks of Session, called Clerks to the Signet, were originally employed in conveyancing business only and in drawing certain writs which required to pass the Signet. As business increased and litigation became more complex, the preparatory steps of a law-suit were undertaken by the writers. In 1754 a new body, the Solicitors before the Supreme Court, were recognised by the Court, who in 1797 obtained a charter of incorporation, and have since engrossed the greater part of purely litigious business owing to their devoting more personal attention to it than the writers, who have found the management of estates and conveyancing more lucrative. This division of labour in legal business, the result of natural causes, must be admitted to be an argument against the union of all branches of the legal profession now frequently advocated; but it is not a conclusive argument.

to keep exact minute-books of them. The regulations as to the Session conclude with a table of fees for Writers to the Signet.

The second division of the Regulations related to the Court of Justiciary. The office of Justice-Deputes was suppressed, and five of the Lords of Session were joined to the Justice-General and Justice-Clerk, with equal jurisdiction in all criminal causes.[1] The names of the assizers or jury were to be inserted in a roll to be signed by the Justiciary Judges or a quorum of them. For the splendour of the Court all the Judges were to have red robes faced with white, and the Justice-General for distinction was to have his lined with ermine. Circuits were to be held once a year in the month of April or May. After the enclosure of the assize, neither the Clerk of Court nor any other person was to be present with the assize.[2] The Chancellor was to mark on the same paper as the verdict how each juryman voted, and the paper was to be sealed and not opened except by order of the Judge. In all criminal causes except treason, the defender or his advocate was to be entitled to the last speech.[3] Lists of witnesses were to be appended to

[1] As regards the office of Justice-Depute, Mackenzie observes: "King Charles by Act of Parliament added five of the learnedest of all his Judges to his Justice-General and Justice-Clerk in place of two advocates who were generally but young or mean, because they had only fifty pounds salary and that seldom paid."—Vindication of King Charles II.'s Government, Mackenzie's *Works*, ii. 347.

[2] The regulation on this point is thus expressed: "That the Clerk of the Court nor no other person be present with the assize after they are inclosed"—but this is elliptical, for "neither the Clerk of the Court nor."—See Hume, *Criminal Law*, ii. 16. 3. There had been a similar provision in the Criminal Ordinance of James VI., as Hume well styles what are usually cited as the Acts 1587, c. 81-91, Act. Parl. iii. 458; but this provision had not been observed. Mackenzie claims the credit of this regulation.—*Works*, ii. 352.

[3] This merciful and just provision has not yet been fully adopted by the law of England. Prior to 6 and 7 Will. IV. c. 114, by that law prisoners were not allowed the privilege of counsel addressing the jury on their behalf except in cases of treason, in which it had been allowed by 7 Will. III. c. 3. And by the existing law, if the prisoner leads evidence, the counsel for the Crown has the reply, and the Attorney-General has the right of reply

every criminal libel and summons of exculpation, by which the accused was enabled to cite witnesses, and lists of the assize were also to be furnished to the prisoner.

The last division of the Regulations related to the Court of Exchequer, and contained provisions as to the fees of the Keeper of the Treasurer's Register, and the Presenter of Signatures, and to the Æques, or Exchequer Accounts of the Crown Vassals. The Act concludes with a recommendation to the Commissioners to take into consideration the procedure of the inferior Courts which they had been prevented from doing by the shortness of the time at their disposal, but this part of the Commission was never executed.

On the whole, the Commissioners must be allowed to have materially improved the administration both of civil and criminal justice, and it would be well for similar bodies if they could point to equally beneficial results from their labours. Whether Stair, however, is entitled to any portion of the credit is not certain. According to Mackenzie[1] he opposed the Act of ratifying the Regulations; but this may have been because he thought the matter should have been left to the care of the Court. Although he objected to the Article as to advocates' fees, he refers frequently with approval, in his *Institutions*, to other parts of the Regulations.

In the Parliament of 1672, which had been opened with great state by Lauderdale, who came down to Scotland as Commissioner—his new wife,[2] the proud and avaricious Countess of Dysart, attracting much animadversion by her presence and

whether the prisoner leads evidence or not,—"probably a relic," observes Mr. Fitzjames Stephen, "of the old inquisitorial theory of criminal justice, under which the prisoner had no counsel, and could not have his witnesses sworn."—*View of the Criminal Law*, p. 161.

[1] Mackenzie, *History*, p. 234.

[2] This lady, Elizabeth Murray, daughter of William Murray, son of the minister of Dysart, the whipping boy of Charles I., was lashed for her own sins by the satirists of the time, with a severity which appears to have been deserved, but there is probably no truth in the insinuation that she had been

ostentation—Stair sat as Member for the shire of Wigton, and there being several vacancies in the Committee of the Articles, he was nominated by the Commissioner, along with Sir James Foulis, one of his colleagues on the Bench, and Sir William Lockhart, to supply those in the representation of the third estate.[1] The subservient Parliament preserved a shadow of its former right of election of the Lords of the Articles by recommending Lauderdale to nominate the persons to fill the vacancies, leaving the nomination to his own choice.[2]

This was an important year in Scotch legislation, in which Stair, as one of the Committee of the Articles, necessarily took an important part. Lauderdale was now preparing to carry into effect his scheme of governing Scotland without a Parliament, "by the good old form of government by his Majesty's Privy Council."[3] In order to this end it was expedient that the

Cromwell's mistress. She was Countess of Dysart in her own right, her father having been raised to the peerage by Charles I. under that title.—See Satyre on Duchess of Lauderdale, Maidment's *Scottish Pasquils*, p. 241.

"Methinks this poor land hath been troubled too long
With Hatton and Dysart and old Lidington.
. . . . . .
While justice provokes me in rhyme to express
The truth which I know of my bonny old Besse:—
She is Besse of my heart, *she was Besse of old Nol*,
She was once Fleetwood's Bessie, and she 's now of Athole.
She's Bessie of Church, and Bessie of State,
She plots with her tail and her lord with his pate;
With a head on one side and a hand lifted hie
She kills us with frowning and makes us to die."

"The Duchess of Lauderdale, not contented with the great appointments they had, set herself, by all possible methods, to raise money. They lived at a vast expense, and everything was set to sale. She carried all things with a haughtiness that could not have been easily borne from a queen. She talked of all people with an unguarded freedom, and grew to be universally hated." Burnet's *History of His Own Times*, i. 339.

[1] Act. Parl. viii. p. 57.

[2] "The Estates of Parliament, according to the former president, recommended to his Majesty's Commissioners to nominate the persons to fill these vacancies."—Act. Parl. viii. p. 57.

[3] Lauderdale to Sir R. Moray. *Lauderdale Papers* quoted by Burton, vii.

Council's power and jurisdiction should receive the colour of statutory legality.

Accordingly, the Acts anent unlawful Ordinations and Conventicles, and the keeping of the King's Restoration-day, gave large powers of inflicting penalties to the Council. The Conventicle Act[1] renewed the Acts of 1670, and, with an appearance of moderation, declared: "Since there might be some question concerning the meaning and intent of the word 'pray,' it was not intended to prohibit praying in families by the persons of the families and such as shall be present, not exceeding the number of four persons besides the family, but the outed ministers were not to have liberty to pray in any families except in the families where they were allowed to preach, and the magistrates in shires and burghs were ordered to be careful to put the Acts in due execution against keepers of Conventicles and withdrawers from public worship, and to return an account of their proceedings to the Council yearly."

It is possible that Stair used his influence to introduce this allowance of family prayers—a practice he himself, as we shall afterwards see, regularly observed, and which may be almost characterized as a national habit of the Scotch people. He certainly promoted the indulgences[2] granted by Lauder-

p. 465.—I am indebted to Mr. D. Douglas, Publisher, Edinburgh, for an opportunity of perusing a transcript of these Papers, which was made from the originals in the British Museum by Mr. Vere Irving. They are of much interest, as showing the spirit of the times. Another portion of these *Papers* in the Edinburgh College Library I had also an opportunity of consulting, but a third in the possession of the Lauderdale family I have not seen. Those I have read contain much less information than was to be expected with regard to Stair.

[1] Mackenzie, in a sentence which indicates that the name of the bloody advocate was not so undeserved as his modern panegyrists would have us believe, observes, "The Parliament did, according to its ordinary method, begin *with laws in favour of the Church, making field Conventicles death.*"—*History*, p. 220.

[2] Kirkton gives an account of a conference which he and Mr. Gabriel Cuninghame had with Stair on 20th August 1672, relative to the second indulgence.—Kirkton's *History*, 330.

dale to the outed ministers in 1669 and 1672. Kirkton calls him the "great confident" of the Presbyterian ministers in the Privy Council, and Sir George Mackenzie [1] represents him as being always on the side of the fanatics. We shall presently find that he did what he could to protest against the severer measures of that body, but it would have been better for his fame had he never sat on the board, which, for the next nine years, misgoverned Scotland. He appears himself to have been conscious of this, for he asserted "that no judge should be either member of Council or Exchequer, for these courts did learn men to be less exact justiciars than was requisite." [2] It was the same feeling that induced him to decline to have anything to do with the administration of criminal justice. "I did never," he says in his *Apology*, "meddle in any criminal Court, nor was I ever judge, pleader, juror, or witness therein."

The Acts of the Parliament of 1672 relating to private law were more creditable than those which dealt with ecclesiastical affairs. Besides the Act concerning the Regulation of the Judicatories, of which mention has already been made, the interests of minors and persons of defective capacity were protected by the wise Statute, which requires inventories of their property to be made at the sight of the next of kin, or, if they are absent, of the judge.[3] The great delay, which was the consequence of requiring letters and Acts of Continuation of Processes, followed by second Summonses, was remedied by a provision, that all Summonses which were in use to be continued were to contain two separate warrants for citation at two distinct diets.[4]

[1] Mackenzie's *History*, p. 321. See also, as to Stair's dealings with the Presbyterians, Burnet's *History of His Own Times*, i. 369.

[2] Mackenzie's *History*, p. 271. [3] 1672, c. 2; Act. Parl. viii. p. 59.

[4] 1672, c. 6; Act. Parl. viii. p. 64. "All law having thought fit to use more citations than one in matters of importance, by our law, before this Act, he who raised a Summons cause execute the same by any person he pleased, who is called a Sheriff in that part, after which he did get an Act of Continuation from one of the clerks, and a second Summonds, both of which were called an Act or Letters, and were signed by the clerk; but

The system of Registration of deeds, which had been introduced in 1617,[1] and which Stair on many occasions helped to improve, received a development in the enactment, that all charters, infeftments, commissions, gifts, and other writings passing the Great and Privy Seal, should be registered in these Registers respectively before the Seal was appended to them; and the writers to these Seals were not merely to mark them on the back as registered, but also to keep a perfect Minute-Book containing the names, surnames, and designations of the persons in whose favour the charters and writs were granted, with the names of the lands and special matters contained in them.[2]

This Act also made two important practical improvements in the form of titles: the Precept of Sasine, which had hitherto been a separate writ passing the Quarter Seal, was in future to to be inserted in the Charter, and permission was given for writing charters and writs passing the Seals in the shape of a

because that was confusing and troublesome, therefore, by this Act, these Acts and Letters are taken away, and two citations on the first Summons were declared to be sufficient."—Mackenzie, *Observ.*, p. 427.

[1] 1617, c. 16. There had been some prior attempts to establish a system of registration. See 1425, c. 67; 1469, c. 39; 1555, c. 29 and c. 46; 1587, c. 64; but the Act of 1617 is the leading Statute.

[2] 1672, c. 7; Act. Parl. viii. 69. Mackenzie's account of the Scotch system of Registration, *Treatises on the Law of Scotland*, p. 28: "An answer to some reasons, printed in England, against the overture of bringing into that kingdom such registers as are used in Scotland," shows how alive the lawyers of this period were to its advantages. He concludes: "Since these registers have been found so advantageous, and that experience hath herein seconded reason, *'tis humbly conceived that Scotland is much to be magnified for these Registers, and that England may, without disparagement, introduce this new among their old Statutes*, whereby they cannot so properly be said to innovate as to enrich and augment their law, 'nec pudet ad meliora transire.' But I know the nation to be so wise and prudent that if they understood our Register as well as they do their own concerns, they would prefer them to those reasons this gentlemen has affirmed against them." This understanding has not however, after the lapse of two hundred years, been attained; the Act of Lord Westbury, introducing similar registers, has failed.

book instead of a roll, their authenticity being guarded by a provision that the Seals were to be appended on a band, which was to go through all the leaves in the margin. The privilege of Royal Burghs to arrest strangers, until they should find security to pay debts due to the burgesses, was confined within more reasonable limits by enacting that it should only apply to debts due for "horse meat or man's meat abuilziements, or other merchandice for which the burgess had no security except his account-books." Burghs of Barony and Regality were declared to have no such rights.[1] The merciful provision of the Ann, which allows the executors of deceased ministers a half-year of their moderate stipends in addition to their legal rights, and which had been introduced by an Act of Queen Mary, and a letter by James VI. to the Assembly at Montrose, in 1580, in imitation of a provision of the German Reformed Church, was further regulated, and the necessity of a conformation in such cases dispensed with.[2]

But the most elaborate of the Statutes which affected private law was that regulating special adjudication, which was introduced in lieu of the apprisings of the older law.[3] The law of Scotland, notwithstanding the strictness of its feudal principles, had at a much earlier period than that of England[4]

[1] 1672, c. 8; Act. Parl. viii. 69.

[2] 1672, c. 13; Act. Parl. viii. 73. The subject of the Ann is learnedly discussed by Mackenzie in his Observations on the 4th Act of Queen Mary's Third Parliament.—*Works*, i. 255.

[3] Kames, *Law Tracts*, x., Execution.

[4] The tardy reform of the English law in this particular is almost incredible. Prior to the Statute of Westminster, the second lands themselves could not be taken in payment of debt. The only remedy of the creditor was by the writs of *fieri facias* or *levari facias*, which attached merely goods, chattels, and the present profits of lands. By that Act the writ of *elegit* was introduced, under which the debtor's goods and chattels were not sold but appraised, and delivered to the judgment creditor at the appraisement in satisfaction of his debt. If insufficient to satisfy it, *one-half of his freehold lands* were delivered to the creditor to be held till the debt was paid out of the rents. But it was not till 1 and 2 Vict. c. 110, that this remedy was extended to *copyhold lands* and to the whole instead of the one-half of

recognised the necessity of allowing land to be sold for payment of debt. A Statute of Alexander I. empowered the Sheriff, when the debtor's moveables were insufficient, to sell his land for payment of his debts.[1] This speedy remedy however fell into desuetude, and by the Act 1469, c. 3,[2] apprisings were introduced by decree in which the creditor sold or entered into possession of the debtor's lands, but the debtor could redeem them within seven years from the purchaser or creditor. The superior was bound to receive the purchaser or creditor as his vassal on payment of a year's rent. The practice which followed upon this Act of leading apprisings before Messengers at Arms, as Sheriffs in that part, and of apprising large estates for small debts, became very oppressive, and although somewhat mitigated by the Act 1621, c. 6, which enacted "that the rents intromitted with by the creditor, if more than sufficient to pay his annual rent, shall be applied towards extinction of the principal sum," a further remedy was found necessary. This was given by the "Act for ordering the Payment of Debts betwixt Creditor and Debtor," passed in the first Parliament of Charles II.[3] Besides several temporary provisions to ease the

the debtor's *freeholds*. Prior to this Act *copyhold lands* could not be taken in execution for debt. And as regards a deceased debtor, his heirs who succeeded to his freehold land were not liable to pay his debts unless named in a bond or contract under seal (called specialty debts), until an Act in 1807 made the heirs of *deceased traders* so liable, and another in 1833 all heirs; but copyhold lands were not liable for the debts of their deceased owners, even where specially named in bonds or contracts under seal, until the Act of 1833. See on this subject Williams, *Real Property*, 9th ed., p. 77, *et seq.*, and 348. The Scotch Courts had, at least as early as 1626, by an equitable extension of adjudication, known as adjudication *contra hereditatem jacentem*, allowed the creditor of a deceased debtor to force the heir either to represent his ancestor, in which case he became liable for his debts, or to relinquish his claim to the debtor's estate, which was then adjudged to the creditor.

[1] Act. Parl. i. 371.

[2] 1469, c. 37; Act. Parl. ii. 96: "An quhare the debtoure has no moveble gudis bot his land, the Scheriff before quham the said soume is recoverit be the brefe of distress sall ger sell the land to the avail of the det and pay the creditor."

[3] 1661, c. 62. At the time when this Act was passed a great part of

landed proprietors sunk in debt by their misfortunes during the troubles, this Act introduced what has since been called general adjudication, by which, where the lands comprised exceeded in yearly rent the annual rent or interest of the sums contained in the comprisings and the expense of infeftment, the debtor might desire the creditor to possess the lands comprised, and the Lords of Session were authorized, on supplication by the debtor, to appoint the appriser to possess such part of the lands as they thought reasonable during the legal reversion or period within which the debtor might redeem. The period of this reversion was extended from seven to ten years, but in the event of the debt not being paid within that period, the creditor's right to the whole lands comprised revived. The Act of 1672 was intended to introduce an alternative form of diligence by which the Court of Session was to adjudge to the creditor a precise or special portion of the debtor's land sufficient to pay the debt, with one-fifth more in respect of his wanting the use of his money, and being compelled to take land instead; the period of reversion of these special adjudications was limited to five years. This Statute, which had been devised by five eminent lawyers, Sir Peter Wedderburn, Sir George Lockhart, Sir John Cunninghame, Sir Robert Sinclair, and Sir George Mackenzie, was strongly opposed by the representatives of the burghs, who represented the moneyed interest, in Parliament, and though it passed through the influence of the barons, was so much altered that it was not even used by the lawyers who had advised it. It subsequently

the nobility and gentry of Scotland were insolvent. Lauderdale is said to to have had difficulty in procuring a new coat to appear at Charles II.'s court on his restoration. His correspondence, when he became Secretary of State for Scotland, is full of petitions for offices or pensions from the poor Scotch nobles and their relations, few of which seem to have been successful if we may judge by their constant repetition. Yet in 1681, out of a total revenue of £90,000 per annum, £25,000 was expended in pensions.—Chambers's *Domestic Annals*, ii. 427. As to the wretched condition of the Scotch nobility, see Scott of Scotstarvit's *Staggering State of Scotch Statesmen.*

became in practice inoperative, though still retained in the form of summonses of adjudication, until rendered unnecessary in them by an Act passed in 1847.[1] Stair's support of this Act is said by Mackenzie to have injured his reputation although he had only complied with the desire of the lawyers who had contrived it, some of whom "transferred their own guilt upon him,"[2]—a singular expression, as Mackenzie was himself one of them, but he probably intended by it to indicate Sir George Lockhart.

Another subject keenly agitated in this Parliament was a proposal to do away with the Summer Session of the Court of Session, and add a month or two to the Winter Session.[3] Lauderdale heard a debate on this point from five on each side—Stair, Mackenzie, the Duke of Hamilton, the Earl of Dundonald, and the Chancellor, being for the change; Lord Hatton (Lauderdale's brother), the Earl of Tweeddale, Lord Gosford, the Provost of Edinburgh, and Sir Robert Sinclair, against it. Lauderdale himself at first was favourably disposed to the proposal, but, according to Mackenzie, altered his mind through the influence of Hatton, and the overture was allowed

[1] 10 and 11 Vict. c. 48, sect. 18.

[2] Mackenzie's *History*, pp. 221 and 222. In 1681 there was an attempt made to rescind this Act which fell to the ground by the adjournment of the Parliament: "There was an Act brought into the Articles at the mediation of the Writers to the Signet for taking away the new Act of Adjudications introduced in 1672, and bringing back the form and practice of comprisings again. This was opposed by the President of the Session, 1mo, because he was the author of the said Act anent the adjudications. . . . By the prorogation of this Parliament this motion ceased. . . . 2do, his son, being a Clerk of the Session, had much benefit by these adjudications." Stair himself says of the Act of 1672: "This Statute has taken away *the greatest reproach upon our law*, which for every debt indefinitely apprised every estate, great or small, which had no excuse but that the debtor might redeem within seven years."—*Inst.* iii. 2. 54.

[3] Mackenzie's *History*, p. 222. An Act abolishing the Summer Session was afterwards passed in 1681, but it was restored in 1686. The month of March was substituted during this period for the Summer Session.—See Fountainhall's *Decisions*, p. 177.

to sleep. When again brought forward in Parliament, he interposed his veto as Commissioner, "swearing it should never be taken away except his Majesty named another Commissioner."[1] As in almost every political decision in this period undue influence was suspected. The Duchess of Lauderdale, it was said, had been solicited or bribed by the town of Edinburgh, whose trade would have suffered by doing away the Summer Session, but Mackenzie declares, "after exact inquiry, I found these to be mere calumnies."

Amongst many grants of markets and fairs made in this Session of Parliament, which indicate the increasing agricultural prosperity of the country, but also the system of monopoly by which it was retarded, was one for a weekly market and two yearly fairs at the Kirk of Glenluce, in favour of Sir James Dalrymple and the Bishop of Galloway. The grant proceeded on a petition, in the conciseness and pertinency of which the hand of Stair may perhaps be detected. It set forth that the

[1] Mackenzie, p. 223, *et seq.* The argument on both sides is curious. On the one hand it was said, "That the Summer Session was a great hindrance to the policy and to the country affairs of the lieges, as well as to their pleasure, for, before men could settle at home after the Winter Session, they were called again to the Summer Session, so that their projects and changes were interrupted and ruined; and the months of June and July, which were the only pleasant months, and the only months wherein gardens and land could be improven, *were spent in the most unwholesome and unpleasant town of Scotland.* Nor could it be denied, that by having two Sessions the people were put to a double expense in travelling to Edinburgh; and when they came in June, the half of the Session was spent before business was entered upon; so that by adding one month to the Winter Session, more business might be despatched in five continued months than in six months with such interruptions as ordinarily attended the beginnings and endings of Sessions." In favour of a Summer Session it was represented, "That no nation which had Courts of Justice did interrupt the course of justice for six months together, and that the want of Courts for so long a time in the kingdom would render it wild, and make malefactors insolent and debtors insolvent, which were greater prejudices than any that could be pressed on the other hand; and since the Session was not in six months able to expede the processes that lay before them, it was not to be expected they could despatch them in five."

burghs of Wigton and Stranraer stand near the extremes of the shire of Wigton, and are twenty-eight miles distant from each other, there being no town or market-place betwixt the two, to the great prejudice of the lieges; and that the Kirk of Glenluce stands betwixt the two burghs in the middle of the shire, and is a necessary pass by which not only all who go from one part of the shire to another, but by which all that go from Ireland to England, and from England and the southern parts of Scotland, must travel, and so is a convenient place for fairs and markets.[1] The days of this fair were afterwards changed by the Parliament of 1681.

This is only one of several instances in which we find Stair actively engaged in measures for the improvement and advantage of his estates. In this or the following year, along with Sir John Nisbet, the Lord Advocate, and his own cousin, John Chalmers, laird of Gadsgirth, he brought an action, in the Court of the Commissioners of Teinds, against the heritors of the parishes of Ochiltree and Tarbolton in Ayrshire. The object of the action was the suppression of the parish of Barnwell, which was inconvenient, owing to its distance from the mansion-house of Stair—the annexation of part of it to the parish of Tarbolton, and part to the parish of Craigie, and the erection out of the three parishes of a new one to be called the parish of Stair. The Commissioners appointed a Committee to inquire into the facts, which gave in a report approving of the proposal, suggesting that a stipend should be modified to the minister of the new parish, and the patronage vested in Stair, who was to provide the manse and glebe. This report was approved of by the Commissioners, and a decree, in terms of it, was pronounced on 9th July 1673.[2]

Stair was again returned for Wigtonshire in the short

[1] Act. Parl. viii. 442.

[2] Connell *On Parishes*, 51-3; and the *Report* of the Committee in the same work, Appendix No. 22.

Parliament of 1673, which sat only from 12th November to the 2d of December, and, after several adjournments, was dissolved on 19th May 1674. It did nothing but pass three Acts relating to the excise, discharging the taxes on salt, brandy, and tobacco; and a fourth, which allowed all persons to wear silk white lace and satin ribbons, a right which, by a Sumptuary Act of the preceding Parliament, had been limited to certain privileged classes. This privilege would not be very extensively taken advantage of, if we credit Dryden's lines:

> "Laced linen there would be a dangerous thing,
> It might perhaps a new rebellion bring;
> The Scot who wore it would be chosen king!"[1]

The frequent adjournments and final dissolution of this Parliament were intended to prevent the grievances, which the Duke of Hamilton and his party alleged against Lauderdale, from being discussed.[2]

In this summer an incident, very characteristic of the times, occurred in the Parliament Close at Edinburgh, in which Stair was an actor, and of which Kirkton has left a graphic account in his *History:* "Because men durst not," he writes, "the women[3] of Edinburgh would needs appear in a petition to the Councell, wherein they desired a gospell ministry might be provided for the starving congregations of Scotland. Fifteen of them, most part ministers' widows, engadged to present so many copies to the principal lords of Councell, and upon the 4th of June filled the whole Parlia-

[1] *Prologue spoken at Oxford.* [2] See Mackenzie, *History*, p. 267.

[3] The part taken by the women of Scotland, from the earliest dawn of the Reformation, in the religious struggles of the times, is very remarkable. "Yea, I dare say," writes Rothes to Lauderdale in 1665, "if it were not for the women, we should have little trouble with conventicles, or such kind of stuff; but they are such a foolish generation of people in this country, who are so influenced by their fanatick wives as I think will bring ruin upon them."—Lauderdale MSS., British Museum, xx. 147.

Parliament Closse. When the Chancellor came up, Sharp came up with him, and as the Chancellor left his coach, Sharp clapt close to his back, fearing, it may be, bodily harm, which he then escapt: only some of them reproached him, calling him Judas and traitor, and one of them laid her hand upon his neck, and told him that neck must pay for it ere all was done, and in that guessed right; but this was all he suffered at that time. Mr. John Livingstone's widow[1] undertook to present her copie to the Chancellor, which she did. He received it, and civilly pult off his hat. Then she began to speak, and took hold of his sleeve. He bowed down his head and listened to her (*because she spake well*)[2] even till he came to the Councell chamber door. She who presented her copy to Stair found no such kind reception, for he threw it upon the ground, which made one tell him he did not so with the remonstrance against the king which he helped to pen. But when the Councell conveened, the petition was turned into a seditious lybell in the vote of the Court. The provost and guard were sent for, but none of them were very cruell, only they threatened, and the women dissolved. Thereafter, for ane example, some of them were cited, and some denunced rebels. Three women they incarcerate also for a time—James Clelland's wife, Lilias Campbell, and Margaret Johnston, a daughter of Wariston's; and this was the end of that brush."

[1] This was the widow of the Minister of Ancrum, who had been one of the Commissioners to Holland in 1650.

[2] Mackenzie gives another account of the Chancellor and Mrs. Livingstone's conversation: "Many hundreds of women," he says, "filling the Parliament Close, threatened the Archbishop of St. Andrews, who past along with the Chancellor, for whose coming he had waited in his own chamber; and some of them had conspired to set upon him, when *a woman, whom I shun to name,* should raise her hand on high as a signal; to prevent which the Chancellor, by entertaining the women with insinuating speeches all the time as he past to the Council, did divert that bloody design."—*History,* p. 273. But it is difficult to believe, if such a design existed, that the Chancellor could have had cognisance of it.

Stair's conduct on this occasion was in keeping with what appears to have been throughout his policy towards the Conventiclers. Though ready to assist in measures of conciliation and accommodation in favour of the Presbyterians, he was anxious to show he discountenanced the acts of the wilder and more riotous spirits of that party.

In this year the contention[1] between the bench and the bar broke out anew. The subject of dispute was the right of appeal from the decisions of the Court to Parliament, which was one part on which the negotiations for union in 1670 miscarried. Although now almost forgotten, this dispute was regarded at the time "as the most notable misfortune that has ever attended the Session,"[2] and was of political as well as professional importance. It was another form in which the stubborn independence of the Scotch character, stifled in Parliament, and in vain attempted to be suppressed in the Church by a mixed policy of severity and indulgence, showed itself. The lawyers, however, can boast no martyrs, though they conducted the contest for a time with spirit.

The controversy originated in an appeal presented to the Scotch Parliament by the advocates for the defender, in an action by the Earl of Dunfermline against the Earl of Callendar,[3] relative to the construction of the marriage-contract of the Countess of Dunfermline. The point, however, on which the appeal was taken was one of procedure merely. The case had been reported by the Lord Ordinary to the full Court, and, when after several adjournments, that the Earl of Callendar

[1] See Mackenzie's *History*, p. 267 *et seq.*, for the fullest account of the Secession of the Advocates. Also Kirkton's *History*, p. 347; Law's *Memorials*, p. 73; Maidment's *Scottish Pasquils*, p. 218; and Stair's *Apology*, p. 6. For modern accounts, Laing, ii. 64, and note ii.; Burton, vii. 476; Address of Lord President Inglis to Juridical Society of Edinburgh.

[2] Forbes's Preface, p. 16.

[3] See the report, Earl of Dunfermline *v.* Earl of Callendar, Stair's *Decisions*, 5th February 1674, and 16th February 1676; also in Morison's *Dictionary*, 2941, 1 Brown's *Supplement*.

might be present, it was called at a diet when his advocates had undertaken to answer without further delay, they pleaded that there was no process, because it ought to have been enrolled for hearing and waited its turn on the Roll, according to the Regulations of 1672. It was replied, that the defender having procured delay on an undertaking to answer, they could not now interpose a dilatory plea.[1] The Court gave effect to this reply, and determined to hear the cause, on which an appeal to Parliament was presented on behalf of Lord Callendar. That nobleman was cited for the appeal as a contempt of Court, and gave in a paper drawn by his counsel, the first advocates then at the bar,—Sir George Lockhart, Sir Robert Sinclair, Sir John Cunninghame, and Sir George Mackenzie, names frequently associated at this time in political measures, as well as in the conduct of litigation,—that he designed nothing but to protest for remeid of law, by which cases were occasionally removed from the stricter procedure of the Court of Session to the more flexible jurisdiction of Parliament. These advocates were then summoned before the Court, where they adhered to their paper. The matter was now deemed of so much consequence that the Lords of Session addressed a letter[2] to the King on the subject; and Lauderdale being about to return to London, he was accompanied in the Spring vacation by Stair and Wallace of Craigie, another of the Judges.[3] The King sent down an answer condemning appeals, but ordering no further proceedings to be taken against the advocates if they disowned them; but if they refused they were to be debarred from "the exercise of any

[1] Stair's *Decisions*, ii. 262.

[2] Letter, 28th February 1674.—Books of Sederunt, Register House, Edinburgh.

[3] Mackenzie's *History*, p. 269. "Immediately after he went to Court, taking the Lord President and the Lord Craigie with him, to second their own letter."

part of their practice as advocates in time coming."[1] Sir George Lockhart and Sir John Cunninghame having been called before the Court, refused to disown the appeal, declaring that "though formal appeals might be said to be contrary to the 62d Act of the 14th Parliament of James II., yet a protestation for remeid of law might be allowed." Upon which they were, in terms of the King's letter, debarred from employment. About fifty of their brethren, resolved to share their fate, seceded from the Parliament House, and left Edinburgh, Lockhart, with one party, taking up their quarters at Haddington, Cunninghame with another at Linlithgow. The Privy Council, by a proclamation on the 19th of December,[2] turned this voluntary exile into banishment, prohibiting their return within twelve miles of the capital. An able but not very respectful letter, originally written by Sir George Mackenzie, but which he tells us was so much altered by Lockhart that he only signed it "to prevent a rupture at a time when their formal adherence to one another was their only security," was presented to the Privy Council,[3] by which it was voted seditious. In the meantime Lockhart, Cunninghame, and Sinclair went to London in the hope of arranging matters with the King, and Mackenzie having "intercepted a letter, wherein they told their confidents that they had resolved to wait the event of that process,[4] in which, if Sir George Mackenzie was absolved, they would be secure by the preparative, but, if he was found guilty, the malice of the pursuers would be blunted before it reached them," was so disgusted that he resolved to submit, and induced the great bulk of the appealers, as the advocates who had withdrawn were called, to present a petition to the King, asking for readmission

[1] King's letter, 19th May 1674.—Mackenzie, *History*, p. 269.

[2] 19th December 1674.—Privy Council Records, Register House, Edinburgh.

[3] 28th January 1675.—Mackenzie, *History*, p. 279.

[4] The process was the Indictment by the Council.—Mackenzie's Defences to the Indictment will be found in his *History*, p. 294.

and disclaiming the right of appeal.[1] They were accordingly restored, and the rest shortly followed their example.[2]

It is easier to pronounce an opinion that an appeal of the kind presented by Lord Callendar's advocates was contrary to law and would have been highly inexpedient, for the Parliament of Scotland was a body quite unsuited to determine legal questions, as Mackenzie[3] himself admits, than to estimate fairly the parts of the leading actors in this transaction. The treatment of the advocates was undoubtedly high-handed, dictated by a policy of repression similar to that which, in the case of the outed ministers, kept up the state of chronic disaffection which ended in the Revolution of 1688. Their protest for the independence of the bar and their neglect of personal considerations in its assertion deserve the sympathy of all who regard the honour of a profession in which, when honour

[1] 24th June 1675.

[2] A. S., 25th January 1676.—Most of the advocates had been already re-admitted. See MS. Books of Sederunt, 7th and 8th January 1676, Register House, Edinburgh.

[3] "This appeal displeased most sober men, who considered that by this method the nobility, who always governed Parliaments, would thereby too much influence private causes; and that ignorant members of Parliament would have an equal vote on the subtlest cases of law with those whose breeding and experience had rendered them fit dispensers of justice."—Mackenzie, *History*, 268. And Lord Fountainhall, one of the seceders, seems to have come round to the same opinion, for he remarks in 1681, when a proposal to allow appeals had been mooted, "Yet some think our civil rights and interests as well and safely lodged in the Session as in a Parliament who judge more with a biass and in a hurry, and with less regard to law, than the Lords of Session do." Burnet, with his usual acuteness, has noted a political object which, no doubt, moved many of the supporters of the right of appeal: "A cause being judged in the Supreme Court of Session, the party appealed to the Parliament. This was looked on as a high contempt *done on design to make the Parliament a Court of Judicature that so there might be a necessity of frequent Parliaments.*" He does not appear, however, truly to estimate the merits of the question, for he adds, "So the Judges required all the lawyers to condemn this as contrary to law. *And they had the words of the law on their side*, for there lay no such appeal as stopt process, nor was there a writ of error in their law. But upon petitions Parliament had, though but seldom, reviewed and reversed the judgments of the Courts, so the debate lay about the meaning of the word Appeal."

is lost, all is lost. But private and less creditable motives mingled in their conduct. Lockhart was believed by some to have advised the appeal, hoping the Parliament would drive Stair from the Presidency, and he would succeed to it. Mackenzie, it is apparent from his own account of the transaction, was actuated throughout by a mean jealousy of Lockhart, from whose talents he could not withhold his admiration while he never spares an insinuation against his character. The popular voice loudly blamed the conduct of Stair. A parody of the ballad *Farewell, Fair Armida* gave expression to this in the following lines :—

"Blame not Craigie Wallace, nor call him your grief,
It was Staire and not he that deny'd you relief;
Abuse not his letter, nor call him severe,
Who never, God knows, had his Majesty's ear.
. . . . . .
But since a rumple President does sit,
That serfs at bar should domineer was fit."[1]
. . . . . .

His former profession as usual was used as a butt by the satirist :—

"Remonstrant[2] good Mas James, how came't to pass
Your once too thick is now so thin a class?
Are your lads laureat, or have they plaid
The truant since you them so tightly paid?

Ill-natured stinkard boys who disobey
Your Regent thus—yet for excuse they say
Your Tuptos and your Ergos are so kittle,
Your Topicks and your Ethicks are so fickle,
Your Ferulas and your Taws they are so sair,
The boys vow they 'll go to school no mair."[3]

Mackenzie, echoing the popular complaints, accuses Stair of having been influenced, in his condemnation of the appeal, by Lauderdale who had a private interest in the cause from his

[1] Maidment, *Scottish Pasquils*, p. 219.
[2] The allusion is to Stair having signed the Remonstrance of 1651.
[3] Maidment, *Scottish Pasquils*, p. 221.

relationship to Lord Dunfermline. Stair has defended himself in his *Apology* by saying, "I have been quarrelled for being the author of the banishing the advocates from Edinburgh in the year 1674 in the harvest vacance, which is taken notice of in the grievances as an encroachment upon their due by the then Privy Council whereof I was altogether free; for it was done in the vacant time when I was in the country, and the inspection of the Sederunts of the Council will demonstrate that in the whole vacance I was not present, yea, seldom was I present in any vacance,[1] and ofttimes absent in Session time, especially when the affairs of the Council required afternoon meetings. God knows I had no pleasure in the affairs which were then most agitated in Council." He has recently found an eminent advocate in the present occupant of his Chair: "Such an invasion of the privileges and independence of the bar," observes Lord-President Inglis, "was alien alike to Lord Stair's natural disposition and to his political tendencies, and is inconsistent with his conduct on all occasions when the interest of the bar was concerned. A few years before he opposed the separation of the advocates into two classes, one to practise in the Outer and the other in the Inner House, and a proposal made about the same time to require an oath from the advocates that they would not take larger fees than such as should be fixed by the Court; and for his services in opposing these innovations he received the thanks of the Faculty."[2]

Yet it is impossible, after a review of the whole circumstances, to accept either defence as sufficient. It is true Stair was absent from the Council[3] at the meeting when the advo-

[1] Stair seems generally to have resided during the vacation in the country. In July 1661 President Gilmour, writing to Lauderdale about some business of the College of Justice, notices, "Lord Stair's hand is wanting, being at this time out of town."—Lauderdale MSS., British Museum, 13th July 1661.

[2] Lord President Inglis.—*Address to Juridical Society.*

[3] This has been ascertained by inspection of the Records of the Council in the Register House, Edinburgh.

cates were banished, but he personally waited on the King when the letter was obtained ordering them to be debarred; and he concurred in, if he did not direct, all the acts of the Court by which this was carried out. It is also true that on more than one occasion he contended for the privileges of the bar, but in none of these had it come in conflict with the Court. On the other hand, the charge of subserviency to Lauderdale does not appear to be made out. Though his intimacy with that strange and coarse character must be deemed a blot on his own, in this instance a more important issue than the result of a private cause and the favour of a powerful minister was evidently involved in the eyes of Stair and the Judges—the independence of the Court. It was for this he fought as keenly[1] as the advocates for the independence of the bar; and had he not sanctioned the unjust measure of depriving the advocates, for their advice to their client, his conduct might have admitted of a complete defence. On the merits of the question, whether considered as one of mere law or of political expediency, he was undoubtedly in the right. It is true the advocates attempted to show that the appeal they had presented was only the known form of a protest "for remeid

[1] Besides that referred to in the text, several letters from the Court of Session to the King and to Lauderdale, with reference to the secession of the advocates, will be found in the Books of Sederunt; see 17th June 1675 and 4th June 1676.—Books of Sederunt, Register House, Edinburgh. There is also a letter from Stair to Lauderdale in the British Museum. Lauderdale Papers, 23. 115, c. 4, No. 8, in which the following passage occurs: "Ther is abundance of processes before the Session, and all carried through as ordinar, which every day doth mor and mor show how far these gentlemen have mistaken their measures in apprehending they are so necessare as that they would not but get their will if they stuck together." The date is 26th January $167\frac{4}{5}$. It occurs in a series of papers headed, "Relating to the Debarred Advocates," which do not contain much new matter beyond what is contained in the Books of Sederunt and Privy Council Records, but show, what I have not observed noticed elsewhere, that there had been at least two other appeals besides that of the Earl of Callendar, one by the Marquess of Hamilton and another by Lord Aboyne in name of the Marquess of Huntly.

of law," by which, in extraordinary cases, suits were removed from the Session to the Parliament; but the appeal presented in this cause was in reality something quite different. It was not, as the protest for remeid of law, a transference of the process on the ground that Parliament was the proper tribunal to decide it, as was done in the case of the burghs of regality —it was a claim that every interlocutor should be subject to review by Parliament, which, if successful, would have made the orderly progress of every action impossible, unless Parliament had sat continuously, and appointed a Judicial Committee for the purpose of hearing causes. The reasons which render the appeal to the House of Lords, on the whole, a benefit, though by no means an unmixed benefit, for the administration of justice in Scotland, are quite inapplicable to such an appeal as was contended for to the Scotch Parliament.

Three of the lawyers who took part in this, the greatest of the three secessions of the period, may be taken as representatives of the brilliant epoch of the Scotch bar when Stair presided over the Court. It is no digression from his life briefly to notice the characters of the men with whom he was brought into daily professional contact.

Sir George Lockhart of Carnwath was, in the opinion of his contemporaries, the greatest lawyer the Scotch bar had ever known. His rival Mackenzie describes him as a new edition of the *Corpus Juris* and as a second Cicero.[1] His junior, Sir John Lauder, describes the auditors of one of his great speeches as sorry when he came to an end,[2]—the rarest praise that can be bestowed on an orator.

[1] Locartius Corpus alterum Juris Civilis, alterque Cicero dici poterat.—*Characteres Advocatorum Scoticorum*, p. 7.

[2] Of Lockhart's pleading in the case of the Town of Edinburgh, Fountainhall says, *Historical Notices*, i. 80, "As for Sir George Lockhart's part in this tragi-comedy, he acted it to the admiration of all hearers with so much lustre and advantage that, tho' in other things he surpassed all his rivals, yet in this he excelled, outdid, and surpassed himselfe; his pungent argu-

Burnet pronounces him the best pleader of any nation he had ever heard, and he had doubtless listened to the foremost advocates of Holland and of England as well as of Scotland, and, like most Scotchmen who have migrated to England, had no prejudice in favour of his own countrymen. Stair, after he had already sat for ten years in the President's chair, and though he was eight years Lockhart's senior at the bar, declared that he would not have accepted the Presidency a second time had not Lockhart's career been closed by death.[1] As is usual in famous speakers, these panegyrics seem scarcely justified by the specimens of his oratory that remain, which exhibit clear reasoning rather than extraordinary eloquence. Yet it would be wrong to discredit them. No fame is less durable than that of the pleader who rises to the highest pitch of his art when, careless of future fame, he concentrates his mind on the circumstances of the passing moment—the details of his cause, however unimportant; the intellect and temper of his judges; and, for the time at least, despises all knowledge which is not essential to the former and acceptable to the latter. But one who satisfied the intellect of Stair must have been no mean master of his profession.

He was the son of one of Charles I.'s judges,[2] which probably led him to choose the profession of the law; but it

ments were carried in such a torrent and irresistible flood of eloquence the most impetuous and charming of anythiug ever I did hear, he did so charm and with his tongue draw us all after him by the ears in a pleasant gaping, amazement, and constraint, that the wonderful effects of Orpheus's harp in moving the stones seems not impossible to an orator on the stupidest spirit; and what Seneca pater, libro 3° Controversiarum in praise says of Cassius Severus, that eloquent pleader, I found verified in myself and others, 'Terrebamus ne definiret,' they were so far from wearying that they were afraid of nothing more than that he should end too soon."

[1] "And it is known to many of eminent quality, that while Sir George Lockhart lived I would neither desire nor accept of the charge."—*Apology*, p. 24.

[2] Sir William Lockhart of Lee.

was his own talents and those of his elder brother William, Cromwell's ambassador to France in 1656, the year George Lockhart passed for the bar, which gained him his first advancement. Only two years after passing, he was appointed advocate to the Protector during life, or "so long as he should demean himself therein."[1] His appointment was determined by an event not contemplated in his patent, the end of the Protectorate; but his father's loyalty saved him from more than a humble acknowledgment of his regret of having been admitted during the usurpation. He at once took the lead of the bar, and though he seems not to have been free from two opposite vices, pride and avarice, his ability was never questioned. It was tested, not merely in the conduct of a mass of ordinary causes, in which diligence and attention to business may sometimes pass for talent, but in the great political trials produced by the troubles of the times, where mediocrity would speedily have been detected—the accusation and impeachment of Lauderdale, the prosecution of Baillie of Jerviswoode, and the defences of Mitchell and Argyle. His conduct in Parliament was independent, and, like Stair, he consistently opposed the unlimited exercise of the royal prerogative.

In the debate against the Act making masters answerable for their tenants, it was urged by him "that it was contrary to the justice of the Divine law, by which the soul only that hath sinned is punished, and never the innocent; and by the common law, *noxa caput sequitur*."[2] "Conscience," said the Chancellor, Lord Perth, at a meeting, in 1686, of the Committee of the Articles, when urging them to exempt the Catholics from the penal laws, "is a vague word, which signifies anything or nothing." "If conscience," rejoined Lockhart, "be a vague word without meaning, we will change it for another phrase, which, I hope, means something. For conscience let us put the fundamental laws of

[1] Pitmedden MS.

[2] Fountainhall, *Decisions*, i. 152.

Scotland."[1] Yet if a story, which has been repeated in various forms, with regard to other tests, may be accepted literally, his principles cannot have been strict. When asked by Oliphant, a brother advocate, whether he could take the test, he replied, "Very well." "Have you indeed considered it?" rejoined Oliphant. "No, indeed," said Lockhart, "for if I had considered it, I had never taken it."[2]

On the death of Sir David Falconer in 1686, he was raised to the bench by James II. as President, and, it was thought, might have retained the office after the Revolution, had he not been assassinated by Chiesly of Dalry on a Sunday morning as he left the Church of St. Giles, in revenge for an adverse decision in a submission to him as arbiter.[3]

It is difficult, in estimating Sir John Lauder of Fountainhall as a lawyer, while traversing Scotch history in the seventeenth century, to forget the light which his indefatigable labours and observations[4] have thrown on many dark passages of the period. Yet it is probably a fair inference, that these same qualities gave him distinction as an advocate and judge. Born on 2d August 1646, the son of a bailie of Edinburgh, he received his education at the High School and University of that city,

[1] Macaulay's authority is Citters, the Dutch ambassador, whose despatch, in the original, he quotes. The Chancellor Perth's speech is thus reported: "Dat het woort conscientie niets en beduyde en alleen een individuum vagum was waerop der Chevalier Locquard dan verder gingh; wil man niet verstaen de betyckenis van het woordt conscientie soo sal ik in fortioribus seggen dat wy meynen volgens de fondamentale wetten van het ryck."—Citters, $\frac{11}{21}$ May 1686, Macaulay's *History*, ii. 120.

[2] Wodrow's *Analecta*, p. 111.

[3] It is a singular coincidence that both his brother and his eldest son met violent deaths. William Lockhart was believed to have been poisoned in the Netherlands, where he went as ambassador for Charles II. His nephew and namesake, the author of the *Memoirs*, a determined Jacobite, who opposed the Union, and acted as agent for the Pretender, was killed in a duel.

[4] He was as industrious as and far more acute than Wodrow, but unfortunately did not digest his collections. They are, however, the raw materials from which much of the history of the time has been written.

where he graduated on 18th July 1664. His next three years were spent in travel in England, France, Flanders, and Holland, during which he attended the law schools at Poictiers and Leyden, but apparently only for a short time. On 9th November 1667 he returned to Edinburgh, and was admitted advocate in 1668. Next year he married a daughter of Ramsay of Abbotshall, Provost of Edinburgh, in consequence of which he became one of the legal assessors for that town. He commenced noting the decisions of the Court from the time of his becoming advocate, and continued it without interruption for nearly fifty years. His Decisions are of great value for the mass of information they contain on the history and state of society in Scotland during the period; but on this account are of less use on legal points, as they continually diverge into irrelevant matter. They are a complete contrast to the dry but precise reports of Stair.[1]

In 1681, with seven other advocates, the leaders being Sir George Lockhart and Sir John Dalrymple, he was counsel for Argyle; and they having all signed a paper that Argyle's explanation of the Test was not treasonable, were called before the Privy Council; but their offence (for as such it was treated) of signing an opinion in a criminal cause was passed over,[2] apparently at the desire of the Duke of York. In 1685 he was elected to Parliament as member for Haddingtonshire, which he continued to represent for twenty years. His political opinions were those of a consistent liberal, and strong Protestant. On the debate, when James II.'s proposals for rescinding the penal laws against the Roman Catholics were laid before Parliament, a question arose as to the name to be given them in the answer to the King's address. His speech on this occasion gives a fair representation of his liberality

[1] Besides his *Decisions*, he left behind him numerous manuscripts, some of which have been published by the Bannatyne Club.

[2] Fountainhall, *Decisions*, i. 166.

and its limits. "I represented," he himself reports it, "that there was no man within the house more desirous to have these odious marks of division buried, and that we might all be united under the general name of Christians. It is true, the names under which they were known in our law were the designations of the papistical kirk, heresy, error, superstition, popish idolatry, and maintainers of the cruel decrees of the Council of Trent; and though it was not suitable to the wisdom and gravity of Parliament to give them a title implying as if they were the true church, and we but a sect, yet I wished some soft appellation with the least offence might be fallen on, and therefore I proposed it might run thus, those commonly called Roman Catholics." The Chancellor Perth, himself a Catholic convert, called this "nicknaming the King," and proposed it might run, "those subjects your Majesty has recommended to us." It was in the end carried that they should be simply called Roman Catholics.

For his opposition to the repeal of the penal laws Fountainhall became obnoxious to the Government: his servants were arrested, and he had to conceal his papers, fearing a search. At the Revolution he was raised to the bench under the title of Lord Fountainhall, by which name he is generally known. In 1692 he refused the office of Lord Advocate, which seems still to have been thought open to a judge, on a ground which does him honour—because he was refused liberty to prosecute the murderers of the men of Glencoe. At the Union he resigned his place as a justiciary judge, but continued as Lord of Session till his death in 1722. As a lawyer his only superiors amongst his contemporaries were Lockhart and Mackenzie, and perhaps the Master of Stair.

The character of Sir George Mackenzie has been represented as an enigma by persons who have contrasted some of his published opinions and some of his public acts with the odium which has attached to his name. How, it has been

asked, could the bloody advocate have been the introducer of reforms in the severity of criminal practice? and the persecutor of men for conscience sake the upholder of religious toleration? How was it that the man who was a moralist in youth, a student all his life, and who in old age retired from public life with content to the seclusion of a University, engaged with keenness in the struggles of ambition, and became the passive instrument, if not the active agent, of despotism? Yet surely history has been read, and life observed in vain, if we are not prepared for such paradoxes in human conduct. But the explanation is not to be found in describing him as a man of moderate opinions approaching to indifferentism, but, by force of his position, a persecutor. Were this true, the worst has not been said of him by his enemies. On the contrary, the key to his character appears to be, that he was, by birth, training, and conviction, the persistent advocate of the hereditary right of kings, and accepted all the monstrous consequences deduced from it by the lawyers and divines, who served and ruined the last of the Stuarts. His occasional expression of liberal opinions, and his occasional acts in the same direction, were forced upon him by the spirit of the times, which penetrated, as it always does, even those who were attached to the older order of things.[1] He was born at Dundee in 1636 of a good Highland family, his father being brother of Lord Seaforth, and his mother a daughter of Dr. Bruce, Principal of St. Leonard's College in St. Andrews. He was educated at the grammar-school of Dundee, and the Universities of Aberdeen and St. Andrews, completing his studies by a three years' course in Civil Law at Bourges, which still retained the fame it had acquired from the lectures of Cujas and Donneau in the close of the sixteenth

[1] That Mackenzie was a Moderate is the view which Dean Stanley hastily adopted in his brilliant but inexact lectures on the Scotch Church from a paper by Mr. Taylor Innes, advocate, in the *Contemporary Review*, to which the reader is referred for an ingenious, but, as it seems to me, erroneous account of Mackenzie's opinions and conduct.

century. In 1656 he came to the bar, and four years after commenced his literary career, which, in the engrossing pursuit of his profession, he never abandoned. His first work was the romance of *Aretina*, one of the earliest prose fictions in the English language. He soon distinguished himself as an advocate, being in 1661 one of the counsel for Argyle, whose son's prosecution he afterwards conducted. In the following year, while still sedulously pursuing the study and practice of the law, he wrote several essays on subjects of general literature, which, though they do not deserve Burnet's disparaging epithet of "superficial," as little merit the encomiums which have sometimes been bestowed on them. In 1663 he published the "Religio Stoici, a short discourse upon several divine and moral subjects;" in 1665 a "Moral Essay upon Solitude," followed in 1667 by an essay upon "Moral Gallantry, wherein the author endeavours to prove that point of Honour (abstracting from all other Ties) obliges men to be Virtuous; and that there is nothing so mean (or unworthy of a Gentleman) as vice." To this he appended "A Consolation against Calumnies, showing how to bear them easily and pleasantly,"—an occupation which he must have had abundant opportunity in his life of practising. These performances, though they show ingenuity and observation of human nature, and occasionally contain passages deserving to be remembered, as the often-quoted one,—"it being in religion as in heraldry, the simpler the bearing it is so much the purer and the ancienter,"[1] cannot justly be rated highly. They consist for the most part of well-expressed common places, and it may be doubted if many readers now peruse more than the title-pages, attracted by the name of the author; nor will the few who have done more think those who have not have lost much. We have already seen the doubtful part he took in the secession of the advocates in 1674. The speech he made to the Court on behalf of his brethren on that occasion

[1] Mackenzie's *Works*, i. p. 73.

has been preserved, and gives a favourable impression of his vigorous but somewhat pedantic eloquence. It was delivered in November 1674. The following is perhaps its best passage: —"I conceive that my employment is my estate, and if any of you left your sons advocates, or were to marry your daughters to advocates, you would think them well provided if the employment were good. It is my plough or ship, nay, it is my liferent right, and so, like these rights, it cannot be taken from me except I commit a crime, and, therefore, till I be guilty of a crime, I cannot forfeit my employment; and I conceive I am guilty of no fault or crime, for many things are discharged which are not criminal, and nothing is a crime but what law makes so. But so it is, that there is no law that declares appealing to be a crime." The peroration is simple yet pointed: "Oblige in this your native country, who serves us as ye know; oblige in this your law, that needs such instruments, especially in its infancy; oblige yourselves, who need such superiors, and remember that to find out a right defence is much more hard and advantageous than to judge it rightly." He owed, his biographer suggests, to the part he took in this contest, his promotion to the office of King's Advocate, to which he was appointed in 1677, on the dismissal of Sir John Nisbet. It was his conduct, as Advocate, which rendered him detested by the Covenanters, whom he persecuted with unremitting zeal, no doubt mainly because he believed their principles inconsistent with civil government, but also because he had no sympathy with their doctrines. He afterwards urged in his defence, that the number of those pursued to a violent death, and the nature of the sufferings of those who escaped it, had been exaggerated; and this appears to be true. But the guilt of innocent blood is not to be measured by its quantity. Another sorry defence, which he made for himself, that he was a mere servant and acted under the orders of the King and the Privy Council, is equally unavailing. His was a voluntary

and profitable service. He did at last resign it, but not till the worst of the persecutions were over, and for a significant cause—the dispensing with the penal laws against the Catholics by James II. in 1686;[1] but he was restored to his post in the following year.

His "Vindication of the Government of Charles II." is very able pleading, but in it, as in his earlier "Defence of the Privy Council,"[2] the highest doctrines of the Divine Right of kings and of the Royal Prerogative are avowed, though the latter, which was addressed to Charles II., is more outspoken than the former, written after the Revolution had scattered such notions to the winds. At the Revolution he strenuously opposed, in the Convention of the Scotch Estates, the resolution moved by Sir John Dalrymple, that James had forfeited the Crown. His

[1] In this he was more consistent in his intolerance than many of the advocates of toleration, but when the Presbyterians are blamed for not meting the same measure to the Roman Catholics which they claimed for themselves, it must in fairness be remembered that they distrusted with good reason the policy of King James.

[2] In the Defensio Secreti Consilii coram Rege, he thus argues: Agnosco Regiam hanc Prærogativam in tyrannidem incurrere posse *sed nihil in omni parte beatum;* et hoc conferendum incommodum cum his quæ in anarchiâ et bello civili necessario oriuntur. . . . Secundum mihi fundamentum erit quod Statuto 251 Parl. 15 Jac. VI. agnoverunt Comitia Reges nostros summos esse eorumque Prærogativas tam amplas et liberas quam quæ ab ullo alio possidentur Rege aut Principe. Cum ergo negari non possit quin Reges Galliarum et Hispaniarum hæc omnia faciant (such kings as Louis XIV. or Philip II.) cui non et Reges nostri qui his concessione apertâ a nobis hoc in Statuto æquiparantur quod usque adeo omnibus innotuit jurisconsultis ut et Larsius qui de Lege Regia in professo limatè scripsit in hujus statuti fide Regum nostrorum imperium non solum absolutius dixerit sed et Galliarum et Hispaniarum imperio plane exæquaverunt. Tertium erit quod Statuto primo Parl. 18 Jac. VI. *Illa omnia Regibus in futurum propria et pro Prærogativis jure constitutum est quæ ab ipsorum prædecessoribus possent et quæ illi olim exercuere.*

So, in his vindication of Charles II.'s government, he says, in describing the Revolution against Charles I.—"From the Records and Acts of Parliament, it is undeniable that the power of nominating Judges, Councillors, and all officers of State, *the power of levying war and raising taxes, were usurped by the people;*" and, in another place, "the necessity of State is the supereminent Law, to which, upon occasion, all particular Acts must bow."

opposition proving fruitless, he quitted his native country, and spent the remainder of his life in the pleasant and congenial exile of Oxford, a striking testimony to the toleration of the new Government. Before leaving Edinburgh he pronounced, in 1689, as Dean of the Faculty of Advocates, the Inaugural Oration at the foundation of the Advocates' Library, which is his most honourable monument. While at Oxford he resumed the moral studies of his youth, writing alternately essays on Reason, Frugality, and the like, and vindications of himself and the government of Charles from the attacks of the Presbyterians.

His legal writings were numerous, and are of considerable value. His Institutions we shall afterwards have occasion to refer to, and to compare with those of Stair. His best work in this department is undoubtedly his Observations on the Statutes, and his special Commentaries on the Bankrupt Acts, and on the Entail Act of which he was himself the author. Besides these he wrote a treatise on Criminal Law, the earliest on that subject in Scotland, and another on Actions. Throughout he is a pure legist. He deals with the letter of the law and what can be deduced from it; but he does this with great natural acuteness and the ability acquired by a practised pleader. Neither his learning, which is wide and varied, nor his diligence, which omits no pertinent point, can be questioned; but these qualities may be devoted to bad as well as to useful ends. "Unfortunately," writes the living historian of Imperial Rome, "education in jurisprudence is not necessarily education in freedom."[1] Of this the life and character of Sir George Mackenzie is an eminent instance.

[1] Merivale's *History of the Roman Empire*, vii. 539.

CHAPTER VII.

1676-1681.

The City of Edinburgh undertakes to pay Stair's house-rent and that of his successors in office as President—Lauderdale in Scotland in 1677—His policy—Trial of Mitchell—The Highland Host in the West, and Bonds of Lawburrows imposed on all persons in trust—Stair opposes these measures in Council—Sir G. Mackenzie's defence of them—Stair obtains alleviation of severe orders of Council against Covenanters—Important Acts of Sederunt of Court of Session as to Imprisonment for Debt and Protection of Debtors—Inventories of Registers—Against Sollicitation of the Judges—Diligence of Executor Creditor—Admission of Notaries—The Convention of 1678—Rebellion of 1679—Murder of Sharpe—Drumclog—Bothwell Bridge—The Sanquhar Declaration—Stair visits London to defend Court of Session—Charges against Lauderdale and the Court—Charles exonerates both—Duke of York comes to Scotland—Stair's speech to him at Holyrood—The Duke returns in 1680 as Commissioner to Parliament instead of Lauderdale—Cruel measures of the Privy Council—Stair defends himself from the charge of participating in them—Member of Parliament for Wigtonshire in 1681—Acts of this Parliament as to the security of the Protestant religion—Succession to the throne—Against Conventicles—Test Act—Account of the debates on it—Legislation as to private law—Stair's Act as to execution of deeds—Exclusion of terce by marriage-contract provisions—Registration in burghs—Judicial sales—Summary diligence on foreign bills—Evil consequences of Test Act—Trial of Argyll for taking it with qualification—Stair flies to London, but is refused an audience by Charles—Returns to Scotland—Deprived of office as Judge—Lives in retirement in Galloway, and prepares his *Institutions* for publication.

THE satisfaction which Stair gave by his discharge of the duties of a Judge continued after he was raised to the Presidency of the Court. In 1676 the Common Council of Edinburgh, in consideration of his signal services to the town, ordered his house-rent and that of his successors as President to be paid out of the city revenue[1]—a privilege which con-

[1] "The same day the Council, considdering the manie signall good offices don be Sir James Dalrymple of Stairis, Lord President of the Session, to the commonweill of this citie in its just concern, which aught never to be for-

tinued till 1741, when it was relinquished by President Forbes.

The following year Lauderdale returned to Scotland, of which he had continued minister notwithstanding the address presented against him by the Parliament of England,[1] in consequence of which he had been removed from office in England where he had been one of the members of the Ministry called the Cabal. The trial and execution of the fanatical Mitchell,[2] for attempting to murder Archbishop Sharpe, on a confession extracted from him by torture before the Privy Council, when his life had been solemnly assured, added to the odium in which his administration was held. Lauderdale, indeed, still hankered after the policy of Indulgence, and the Presbyterians never deemed him their greatest enemy, attributing the severity of his government to the prelates and the military commanders, who now began to assume an ominous prominence in the

gotten be us nor our successors, and to the effect we may in some small measure evidence our sense of these many renewed acts of kyndness, both to his Lordship, and, on his accompt, to the suceeeding Presidents of the Session, therefore we ordain and appoint our present Town Thesaurer and his successors in office to pay the house-rent and maill of his Lordship and succeeding Presidents of the Session, their dwelling-houses within the Citie yearlie in time cuming to the relative heritors and landlords of their dwelling-houses, beginand the first year's payment at Martinmas 1676, yearlie and termlie thereafter, declaring hereby that payment made be our said Thesaurer to the said relative landlords, and their discharge of the house-rents shall be a sufficient instruction to the present and succeeding Thesaurers of the burgh for obtaining allowance thereof in their relative accounts thereanent these presents shall be a sufficient Warrant."—Edinburgh Town-Council MS. Records, 15th December 1676. The Council had on similar grounds granted a seat in the Tolbooth Church to Stair on 25th February 1676, *ibidem.*

[1] Cobbett's *State Trials*, vi. 1025; Proceedings in the House of Commons against the Duke of Lauderdale, p. 1033: "Resolved *nem. con.* that an address be presented to his Majesty to remove the Duke of Lauderdale from all his employments and from his presence and councils for ever, being a person obnoxious and dangerous to the Government."—See Macaulay, i. 223.

[2] For an account of this trial, see Burnet, *History of his Own Times*, i. 413, and the subsequent trial of Hatton for perjury in denying that Mitchell had been promised his life.—Cobbett, *State Trials*, vi. 1262.

Privy Council, and its corruptions to his wife and his brother Lord Hatton ;[1] but whatever may have been the influence which prompted them, some of the worst measures of the Government of Charles II. in Scotland were perpetrated in this and the next years. Against one of these, the introduction of the Highland Host into the West Country, where the conventicles prevailed most, Stair protested, but in vain, as he did also against the imposition of the bonds of lawburrows, by which all persons in trust or public office were forced to oblige themselves to deliver up every Presbyterian minister who kept conventicles. "I do not remember," he says in his *Apology*, "any one person in Council or Session that could never be induced to sign that bond or approve that road, but myself."[2] Sir George Mackenzie, who had become King's Advocate in 1677, has left a defence[3] of both these unjust and impolitic Acts of the Privy Council, which may be accepted by those, but by those alone, who regard the Revolution Settlement as a misfortune to the country. The danger of anarchy, such is his argument in brief, was greater and more inconvenient than the danger of tyranny, and to avert this danger state necessity justified any measures which might

[1] Kirkton's *History*. Fountainhall's *Observations*, i. 177, 3d October 1677 : "Whence all this favor came to the Nonconformists seemed strange to some. It was a politique of my Lord Duke Lauderdale and his Dutchesse to render himself gracious and acceptable in the hearts of the people and regain his lost credit, which undoubtedly was likewise a cause that made him listen and give ear to ane indulgence and accommodation with the Presbyterians, for he was serious in it, and did it not merely to cajole and gull them. *The carriers on of it were the President, Argyle, Melville, and Arniston, with James Stewart and the ministers of that party who were allowed freely to come to Edinburgh.* They offered to raise £15,000, and that presently, for my Lord Lauderdale's service, and to contrive the elections so that in Parliament he should carry a subsidy and the Parliament get a ratification of what he pleased, provyding the Indulgence was secured to them by Act of Parliament so that it might not be next day recalled."

[2] Burnet, whose notices of Stair are throughout tinged with malice, says, "Lord Stair pretended that by a fall his hand was out of joint, so he signed none of these wild orders."—*History of his Own Times*, i. 419.

[3] Defensio Secreti Consilii coram rege.—Mackenzie's *Works*, i. 161.

be requisite. The chief cause, however, of the widespread dissatisfaction with the Government, which he termed anarchy, was the refusal to allow freedom of conscience in religion, and the consequence of the method taken for its suppression was the maintenance, for a brief period, on the throne of Britain of two bad kings. In modern times it has been urged that sufficient allowance has not been made for the difficulties the Government of Charles II. encountered in Scotland. But the task of ruling men is always difficult, though many who aspire to it forget the fact, and he who attempts it and fails, or succeeds for a time by injustice, whether king or minister, must submit to disgrace. Whether the moderate policy Stair advocated, if it had been pursued consistently, could have staved off revolution, with monarchs such as the last of the Stuarts, may be doubted; but it founded a new dynasty—that of constitutional monarchs, when adopted by William of Orange.

Although Stair failed in his opposition to these imprudent measures, he succeeded in procuring some alleviation[1] in the severity of the orders of the Council. In particular he carried two points: (1.) that there should be specification of time and place in indictments for Church disorders; and (2.) that persons accused should only be examined as to their own guilt, "seeing nothing can be referred to a defender's oath but what concerneth himself." For these rules of simple justice in criminal proceedings Sharpe declared that Lauderdale had put the King's interest further back in one month than could be retrieved in seven years.

While the Privy Council was thus occupied, the Court, over whose deliberations Stair exercised a more direct and powerful influence, was engaged in a work which attracted less notice, but has been of permanent value, the improvement of the law. The Court of Session had, like its model, the Parlia-

[1] *Apology*, p. 5; Wodrow, ii. 269; Report of Committee for Public Affairs, 5th October 1677.

ment of Paris, claimed and exercised since its foundation a *quasi*-legislative power which, although it was employed chiefly with reference to the regulation of its own procedure, was by no means confined, as in the present day, within that province. Thus amongst the Acts of Sederunt (as the rules agreed on by the sederunt or quorum of the Judges are called) of this period we find one concerning prisoners for debt, which, on a narrative of the hardship of requiring imprisoned debtors for small sums to obtain a charge from the Court to liberate them, allowed the keepers of prisons to do this on a discharge from the creditor being produced if the debt was under 200 merks.[1] The interest of creditors was guarded by another Act, which required intimation to be made to them of all suspensions and charges to set at liberty, which were still necessary where the debt exceeded that sum.[2] A practice of granting protections from arrest for debt on the pretence that the debtor was cited to appear as a witness, which had been much abused, was checked by requiring all applications for such protections to be accompanied by a declaration under the hand of the party who cited the debtor, that he had been really cited and was a necessary witness.[3]

The vacancy, occasioned by the promotion of Sir Archibald Primrose to be Justice-General, in the office of Lord Clerk Register, gave an opportunity for ordering the public registers to be arranged and inventoried,[4] which was done in the course of the following year, and on 18th July 1677, there was entered in the Books of Sederunt an inventory of the registers of Parliament and the Privy Council, of the Acts of Sederunt of the Court, and of the writs and decrees recorded in the Books of Council and Session, as well as of the charters and sasines, or titles to land, and of the various diligences or modes of execu-

[1] A. S. 5th February 1675.

[2] A. S. 26th July 1675.

[3] A. S. 1st February 1676.

[4] A. S. 4th July 1676. / 13th July 1676.

tion, arrestment, apprisings, hornings, and inhibitions, by which the rights of creditors were so carefully adjusted and secured under the provisions of the Scotch law.

This inventory contains the most important parts of the fine collection of papers preserved in the Register House at Edinburgh, stretching back to the commencement of the fifteenth century,[1] and which, long after the original purpose of the deeds as titles has been served, forms valuable material for the history of the national institutions and law of Scotland. Many of the Sheriffs having failed to obey the directions of the Act of 1672 as to keeping minute-books of the register of sasines in their several counties, letters of horning were directed against them, charging them to meet and compare the register of hornings, inhibitions, sasines, and reversions in their respective shires with the minute-books, under severe penalties.[2]

An Act passed in the same year, 1677,[3] against Sollicitations of the Judges by parties in the cause provided that it should be "a relevant reason of declinator against any of the Lords Ordinary or Extraordinary that they have received or heard any sollicitation or verbal information in the cause during the dependence thereof, but upon the first observing that the matter offered to be spoken to them did bear or impart any sollicitation or verbal information in a cause depending, if they did not use all the means they could to stop or withdraw, to hear any further thereof, or in case any sollicitation or information in a cause depending be offered by a known letter, if they do not present the same to the Lords." All members of

[1] The Register of Charters commences in 1423, that of Acts and Decreets in 1455, that of the proceedings of Parliament in 1481. Most of the other Registers only go back to the sixteenth century. The earlier records have in great part perished.

Let us honour the men who have gathered up the fragments which remain—Sir John Skene, Lord Hailes, Mr. Thomas Thomson, Dr. Joseph Robertson, and Professor Innes.

[2] A. S. 4th January 1677.

[3] A. S. 6th November 1677. See further, A. S. 24th December 1679.

the College of Justice were prohibited from soliciting the Judges under the pain of deprivation, and severe fines were to be inflicted on parties who thus attempted to prevent the course of justice. Although the Act did not finally extinguish the evil practice, it probably entitles us to treat a few cases in which Fountainhall[1] has insinuated Stair himself may have been unduly influenced in his judgments as without foundation.

A useful Act in 1679 regulated the diligence of executor creditors, by which a creditor who confirmed or made up a title to the deceased debtor's estate was declared liable for the recovery of his property and debts due to him, but was allowed —in this differing from other executors—to confine his confirmation to a part of the estate sufficient to satisfy his own debt.[2] In the following year the admission of notaries and the revision of their protocol books by the Lord Clerk Register, both of which had been neglected during the troubles, were restored to their former footing as regulated by the Acts of Parliament; and the clerks of inferior Courts were ordered to be examined, sworn, and admitted before the Court of Session.[3]

These are only specimens of the active wisdom of the Court during the Presidency of Stair, but they may suffice to show the watchful eye he kept on all branches of the law; for it was, and still is, the business of the President of the Court to prepare and submit such Acts for the consideration of his brethren. The fact that no Parliament sat between 1673 and 1681, except the Convention of 1678, probably made

[1] Fountainhall, *Historical Notices*, i. 17. *The Tutors* v. *the Mother of Govan*, 23d February 1671: "The Lords, because they discovered ane inclination in my Lord President towards the tutors, they therefore in a bang combined on behalf of the mother only because it was represented to them that the President was a friend to the tutors, and carried it over his belly that the child should continue with the mother." See also Fountainhall's Remarks on the case of *Bishop of Dunblane* v. *Kinloch of Gilmerton*, *ibid.* i. 107. 22d June 1672.

[2] A. S., 14th November 1679.

[3] A. S., 22d July 1680.

this judicial legislation more necessary, and gave it a wider scope.

This Convention, in which Stair as usual sat for Wigtonshire, had been summoned by Lauderdale at a time when many of his principal opponents were in England,[1] and was completely in his interest. It voted a supply of £1,800,000 Scots, that His Majesty might be the better "enabled to raise more forces for securing his ancient kingdom against all foreign invasion and intestine commotions," but declared, in a letter to the King, that as this supply is "furnished at this time with respect only to the present exigents, so this shall not lessen forwardness in appearing universally betwixt sixty and sixteen with great alacrity and cheerfulness whenever your Majesty calls for our assistance."

In the year 1679 the rebellion, which had been long brewing in Scotland, burst out; nor does it seem an unfounded conjecture that it had been fomented by the measures of the Government,[2] which desired to rule Scotland by martial law and to have an army at the King's disposal for use, if necessary, in England. The murder of Archbishop Sharpe at Magus Moor,[3] though accidental in its occasion, had long been looked forward to, and twice attempted. It was the prelude to the drama of which Loudon Hill and Drumclog,[4] where Claverhouse was worsted—Bothwell Bridge,[5] where the Duke of Monmouth

[1] Laing, ii. 81. "Notwithstanding the prohibition to quit the kingdom fourteen peers and fifty gentlemen, of whom Duke Hamilton was threatened, and the Earls of Cassilis and Loudon, Lord Cochrane, and others, were charged with lawburrows, and denounced outlaws, repaired to court, and were joined in their complaints by Athole and Perth." *Ibid.* p. 83: "The absence of his opponents was seized by Lauderdale as an opportune moment to summon a Convention of Estates." See Act. Parl. viii. 221.

[2] "When I was once saying to him," writes Burnet, describing a conversation with Lauderdale, "was that a time to drive them into a rebellion? 'Yes,' said he, 'would to God they would rebel, that so he might bring over an army of Irish papists to cut their throats.'"—*History of his Own Times*, i. 341; and see Burton's *History of Scotland*, vii. 515.

[3] 5th May 1679. [4] 1st June 1679. [5] 22d June 1679.

routed the Covenanters—and the revolutionary Sanquhar Declaration [1] of Cameron and Cargill, were the leading acts.[2]

In the summer of 1679, about the very time the civil war began in Scotland, Stair went to London by command of the King.[3] The occasion of his visit was the presenting of the charges, so long kept back from a hearing, against Lauderdale by the Duke of Hamilton, the Marquess of Athole, Sir John Cochrane, and other noblemen and gentlemen, with which a complaint against the Court of Session was conjoined. Charles gave an audience on the 8th and 13th July,[4] when the charges were supported by Sir George Lockhart and Sir John Cunninghame, and answered by Sir George Mackenzie. The principal articles [5] against Lauderdale were (1) the bringing of the Highland Host into the West; (2) the taking of free quarters by the soldiery; (3) the incapacitating persons from office within burghs; (4) the bond for making masters and landowners answerable for their families, servants, and tenants; (5) the taking of lawburrows; and (6) the imprisoning persons without cause assigned (*indictâ causâ*). What the particular charges against the Court of Session were we do not certainly know,[6] but one appears to have been a

[1] 22d June 1680.

[2] See the account of these transactions in Burnet, i. 471, *et seq.*

[3] "The summer Session of 1679, when I attended His Majesty by his own command."—Epistle Dedicatory to Stair's *Decisions*.

[4] See in Wodrow, iii. 168, a Letter of 13th July 1679, from one of Lauderdale's party, with an account of the debate.

[5] See Wodrow, iii. 168, and in Somers *Tracts*, 1st ed. vii. 200: "Some further matters of fact relating to the administration of affairs in Scotland under the Duke of Lauderdale," which is preceded, p. 195, by "The Impeachment of the Duke and Dutchess of Lauderdale, with their brother, my Lord Hatton, presented to his Majesty by the city of Edinburgh."

[6] In the end of the debate Alexander Munro presented his petition, complaining that he had been turned out of the clerkship of the Session, and this procured by the Duke of Lauderdale and his brother. As to Munro, his petition, he was informed, that he had received seven thousand merks of composition, and thereupon had demitted his post.—Wodrow, iii. 169.

complaint as to the appointment of a new Clerk of Session through the influence of Lauderdale. The King, as might have been anticipated, declared himself in favour of his minister, and, by separate letters addressed to the Privy Council, the Lords of Session, and Lords of Justiciary, pronounced himself satisfied in all points with the administration of Scotch affairs. Stair, in the following letter to his colleagues written from Windsor on the last day of the audience,[1] congratulates them on the success of his defence of the Court:—

"My Lords,—I return your Lordships thanks for the honour of yours of the 6th of this instant. By his Majestie's gracious letter sent herewith you will see I put you not in vain hopes of his signal favour. I believe you could not wish me expect more kindness or confidence from a king than is exprest in it; and by his letter to the Counsell you will perceive what tenderness his Majesty hath of the laws of the kingdom, and what trust he reposes in the Judges. It were the worst of crimes to disappoint his expectation. *But on the contrair to be more and more carefull that, be the speedy and impartial distribution of justice, his people may find themselves in securitie and quietness, and that their rights and interests are securely lodged in your hands.* The debates here being now at an end I hope we shall be able to see you ere you part, and to evidence what carefulness and diligence have been used be those of your number here for your safety, wherein ye have not wanted my moyen and endeavour.—My Lords, your Lordships most faithful and most obliged Colleague and Servant,

"Ja. Dalrymple."

Stair had probably been in London during the stormy session of the English Parliament which had closed its sittings on the 25th of May, and may have been an auditor of the

[1] July 13, 1679.

violent debates on the resolution[1] to bring in a bill "to disable the Duke of York to inherit the imperial Crown of England," which resulted in the Exclusion Bill, and of the passing of the Habeas Corpus Act[2] on the last day of the Session, which has made this Parliament for ever memorable in constitutional history. Soon after his return to Scotland, the Duke of York was sent there in part to avoid the clamour which had risen against him in England, but also, it may be suspected, if necessary to supersede Lauderdale. On the 24th of November he arrived in Edinburgh and took up his residence at Holyrood House. Stair had refused[3] to allow the Court of Session to adjourn to meet him on his way to the capital, on the ground that the Session, being instituted by the King and Parliament, could not adjourn themselves without their consent, and when, at the head of the Court, he waited upon the Duke at Holyrood he addressed him in a speech the outspokenness of which can have little pleased the future monarch. He declared it was matter of great joy to the nation to see one of the royal family among them after being so long deprived of that honour, and that the nation, being entirely Protestant, it was the fittest place his Royal Highness could make his recess to at that time.[4] Although the Duke did his utmost, by entertaining the nobility and conciliating the people,[5] to earn the favour of the Scotch, his presence could not have been acceptable to a nation the bulk of which regarded Papists as their natural enemies. After a short stay he returned to London in the following

[1] This debate was on Sunday, 4th May 1679.—Christie's *Life of Shaftesbury*, p. 331.

[2] The Habeas Corpus Act passed on 25th May 1679. Stair was in London at least as early as 3d June 1679.—See Fountainhall, *Historical Notices*, i. 224.

[3] Somers *Tracts*, Scott's ed., xi. p. 551. [4] Forbes's Preface.

[5] Mr. William Tytler, who had conversed with persons who remembered the Duke's stay at Holyrood, reports, "The princesses were easy and affable, and the Duke studied to make himself popular amongst all ranks of men."—*Archæologia Scotica*, i. 499, quoted in Chambers's *Domestic Annals*, ii. 403.

February, whence he retired to Brussels. He came back, however, to Scotland in the end of 1680, accompanied by his wife, Mary of Modena, and, if we could believe the Court Chroniclers, they were received with acclamation by the people.[1] "Nor indeed was there anything wanting to express the general joy of all here for the happy arrival of so excellent a prince and so dear to this kingdom." Lauderdale had at last lost the favour of the King, and Charles gave his brother a Commission to hold a Parliament. But if the Duke's conduct had given hopes of a milder administration, it became soon apparent how little this was to be depended on.

Before the meeting of Parliament, the Privy Council and Court of Justiciary were constantly at work. A proclamation was issued on the 1st of April against field and other conventicles, by which heritors within whose lands or houses such conventicles were held were enjoined within three days to give notice of them to the Sheriff and Magistrate, under a fine of a fourth of their valued rent. On receiving notice, the Sheriff or Magistrate was to order a Court of heritors to try who were at the conventicles, and to fine them whether absent or present at the trial. They were further ordered to assist in levying these fines under the pain of being themselves liable if they did not. Reports of their diligence were to be presented to the Council yearly in the months of July and December. Full power to try before the Council itself or the Justiciary Court persons present at conventicles was reserved.

Nor was the execution of the severe law against conventicles confined to the ordinary Courts. Military commissions were granted to Graham of Claverhouse and other officers, and Courts held by them in the southern and western shires. Garrisons were quartered in the houses of several of the principal nobility and gentry. Thus no class was free from the

[1] "A True Narrative of the Reception of their Royal Highnesses at their arrival in Scotland."—Pamphlet, Adv. Lib.

exactions and oppressions of the soldiery. The worst horrors were, however, reserved for the Privy Council and the presence of the Duke himself. The torture of the boot and the thumbkins was resorted to to extort confessions on which the victims were afterwards tried before the Justiciary Court, and, if possible, made to implicate others, for the Regulations of the Act of 1672 were not applicable to the Council. It is related by Burnet that, while most men shrank from the sight of the torture, "the Duke was so far from withdrawing that he looked on all the while with an unmoved indifference, and with an attention as if he had been to look upon some curious experiment." The sufferings of these times have never been forgotten by the people of Scotland. It was very necessary for Stair in his *Apology*, when attacked in the next reign with having been a member of the Privy Council, to disown all participation in these proceedings; but his emphatic declaration, "God knows I had no pleasure in the affairs that were then most agitated in the Council," appears justified by the facts that he was always regarded by Archbishop Sharpe, Sir George Mackenzie, and the party who upheld the unlimited exercise of the royal prerogative, as a supporter of the fanatics, that he himself soon fell under the ban of the Council for sheltering the persecuted ministers, and that he retained through life the good opinion of the Presbyterian clergy.

In the spring of 1681 the Duke of Rothes, then Lord High Chancellor of Scotland, died, and Stair was suggested as his successor; but the influence of the Duke of York,[1] who was highly offended at him, prevented his appointment. In this year he again represented Wigtonshire in Parliament, and was one of the Committee of the Articles. The Parliament met on 28th July, being the first since 1673—the meeting of Estates in 1678 having been a Convention merely.

The King's letter and the Duke's opening speech contained

[1] Somers *Tracts*, Scott's ed., xi. 551.—Impartial Narrative.

an assurance of the security of the Protestant religion, and exhorted the Parliament to take effectual courses "for suppressing those seditious and rebellious conventicles, from whence proceed all disorder and confusion."

The first Act passed was one ratifying the former laws for the liberty of the Kirk and the security of the Protestant religion and of all Acts made against Popery. It had been proposed that these last words should be omitted, out of tenderness to the Duke; but they were restored,[1] without a vote, on the motion of the Earl of Argyle, supported by Sir George Lockhart and Stair, although opposed as unnecessary by Sir George Mackenzie and the bishops. The second Act was an acknowledgment of the right of Succession to the Crown of Scotland according to the known degrees of proximity in blood, and contained a declaration "that no difference in religion, nor no law, nor Act of Parliament made, or to be made, can alter or divert the right of succession and lineal descent of the Crown to the nearest and lawful heirs."

After voting a supply to the King—which expressly bore to be in respect of the danger from conventicles and the necessity of increasing the forces to keep them down—an Act, against which Lockhart protested as contrary both to the divine and common law, by which men were answerable only for their own transgressions, was passed on 29th August, entitled for Securing the Peace of the Country, by which masters were made liable for the fines of their servants, and heritors of their tenants, with a right to retain them out of their goods. The severe fines already existing were doubled, and the King was empowered to name persons as his Commissioners for punishing Conventicles, irregular baptisms, and marriages. But the most important of all the statutes of this Session was that relating to the Test. This famous Act was passed on 30th August, having been hurried through the

[1] Wodrow, iii. 191.

Committee of the Articles [1] and Parliament on the same day. It was proposed, in pretended compliance with a desire expressed by many members that something more positive should be enacted for the security of the Protestant religion than the first Act of the Session. Stair had drawn a bill [2] for the pur-

[1] Wodrow says, iii. 298, "When the first Act anent religion was read and passed, it appeared very general and insufficient to all members who had any regard to the Protestant interest; and upon the desire of additions, or another Act by severals, the Commissioner, in face of Parliament, promised that full time and opportunity should be given to bring in any other Act which should be found necessary to secure the Protestant religion; nevertheless, though many overtures, memorials, and draughts were offered, yet they were never allowed to be read *before the Lords of the Articles* or Parliament; *but this Test Act was framed in private, and at length obtruded.*" It would appear, however, that the draft of the Act which passed had been submitted to the Lords of the Articles, for Fountainhall says, "The day the Test was voted the Articles sat till six at night," having apparently met at ten in the morning (*Decisions*, i. 250), and the author of the *Impartial Narrative*, Somers Tracts, Scott's edition, xi. 551, states it had been before the Articles the morning of the day it was voted in Parliament.

[2] In Fountainhall's MSS., Advocates' Library, 31. 6. 15, there is the draft of an Act "intended to have been passed in the Scots Parliament held in the month of August 1681, for Securitie of the Protestant Religion against Poperie and a popish king, but which was then laid asyde, other two Acts put in place thereof, and past in that Session of Parliament." Fountainhall makes the following observations on this draft, which it appears highly probable was the bill proposed by Stair: "This intended Act for Securitie of the Protestant religion would have quieted much better the minds of the people than the Acts which were past in the Parliament anent religion and the Test, and did contain several clauses more strict than these Acts consented to, such as—1° that the magistraits who should prove unwise and slack in putting the laws to execution against the papists should be severely fyned and punished; 2^do^ that the kings and queens of Scotland, immediately on the entry to their government, should take the Coronation Oath as it is contained in the 8th Act of James the 6th 2d Parliament in 1567 (for the old coronation oath recorded by Balfour in his Practiques, Tit. 2, of the King, folio 2d, in fine), as it is heir enlarged; none of which clauses are in the Acts that are passed. Yet there were sundry other clauses offered and sought for satisfying the loyal Protestants, viz. that it should be hy treasou in any person to exeree or assume any government or publick place without taking the Test, and that the s^d^ cryme of treason should be irremissible be the King alone, and should only be pardonable be the King and Parliament joyntly; and if there were no Parliament in being at

pose, which had been thrown out in Parliament on the previous day, and the Act now proposed was truly designed to counteract its pretended object. Its first clause, as it stood when brought before the estates, contained no definition of the Protestant religion, which was intended to be secured; but Stair proposed and carried a statement that it should be described as the "religion contained in the Confession of Faith recorded in the first Parliament of James VI.,[1] which is founded on and agreeable to the written word of God." His object in this addition was, as he himself expressed it, "to provide the safest hedge against Popery;" for in that Confession Popery is distinctly condemned.

He probably thought that the insertion of this clause would either lead to the Act being dropped, or render it innocuous. Unfortunately, few of the members of Parliament, if we may credit Wodrow, had read the Confession of Faith; and the Duke of York, though in his opinion this addition was calculated to ruin all "honest men," by which term he understood Papists, preferred to allow the Act to pass with it rather than have no test at all.[2]

There was a keen debate as to the provision in the Act which imposed the test on electors and members of Parliament; but this was finally carried. A proposal that there should be

the King's decease, then the former Parliament members should be empowered to reassemble and sit by the space of 6 months till they settled the wholle offices, ecclesiastick, civil, and military, in Protestant hands, etc., according to the offers the King made to the Parliament of England in Aprill 1679 which lie printed besyde me. See more anent this affair in my folio Historick manuscript, marked 9, page 23, and in the 4to manuscript, marked A. 5, paginis 86, 87, and 88."

[1] 1567, c. 3; to which is appended "The Confession of the Faith and Doctrine believed and professed by the Protestantes of Scotland, exhibited to the Estatis of the same in Parliament, and be their publick votes authorized as a doctrine grounded upon the infallible Word of God."

[2] "So it seems that article of the Protestant religion was forgiven for the service that was expected from the other parts of the Test."—Burnet, *History of his Own Times*, ii. 516.

two tests—one less strict for Presbyterians, another more severe for Papists—was rejected. So also was an amendment of the Earl of Argyle, that the exceptions in favour of the Royal Family should be limited to the Duke of York. The same nobleman argued strongly against the proposed oath, observing, in language the truth of which would now be universally acknowledged, but was then a newly discovered political truth, that "*he was of opinion that as few public oaths should be required as might be, and these as short and clear as possible.*" Another member, the Laird of Gordonstoun, spoke in a similar strain, declaring "himself against all penal and sanguinary laws in matters of religion—that the conscience should not be forced, and that these severe sanctions and penalties operated nothing save to render men hypocrites." The ordinary temper even of intelligent and liberal politicians at this period is strikingly shown by the comment of Lord Fountainhall on this speech: "So that his design seemed to resolve in a latitudinarian toleration and forbearance of all religious persuasions."[1] At last, notwithstanding the demand of many members for delay, the Act passed, "the draught in the clerk's hands being so much changed and interlined on the course of the debates that the far greater part knew not what was in it or what was out of it."[2] Argyle, Stair, and several other members refused to vote.

The legislation regarding private law was, as usual, a brighter side of parliamentary history.

The most important of the Acts passed in this department was drawn by Stair, and is sometimes called after him, Stair's Act.[3] It still forms the rule of the law of Scotland as to the execution of deeds. Proceeding on the preamble that the custom introduced when writing was not ordinary, by which witnesses

[1] Fountainhall's *Decisions*, i. 153.
[2] Wodrow, iii. 299.
[3] 1681, c. 5, Act. Parl. viii. 242.

whose names were inserted in writs, though not subscribing, should prove their authenticity, had produced bad consequences, it provided that in future only subscribing witnesses should make deeds probative,[1] and that all deeds in which the names of the writers and witnesses were not designed should be null, and their designations should not be supplied by extrinsic proof. It further enacted that no witness should subscribe unless he either knew and saw the party subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, under the penalty of being held accessories to forgery. It concluded by applying the general rule that none but subscribing witnesses should be probative specifically to all the principal writings known to the law of Scotland, and by declaring that in all cases the witnesses should be designed in the body of the writ; otherwise it should be null. An unfortunate practice, now sanctioned by decision, has allowed the testing clause in which the witnesses are so designed to be filled up at any distance of time after the deed has been executed; and this is perhaps not sufficiently guarded against by the words of the Act. This Statute, for the time when it was made, may be deemed a considerable improvement in the law, but it would be expedient that the execution of deeds should now be simplified and made uniform throughout the United Kingdom.

Several other useful Acts of this session must all have passed under the cognisance, if not at the instance, of Stair in their preparation by the Committee of the Articles. By one,[2] a wife who received a provision by her marriage-contract was excluded from her terce, unless it was expressly provided she should receive it. By another,[3] the system of Registration was applied to Burgh Sasines and Reversions. A third[4] gave the purchaser of

[1] That is, prove themselves without the necessity of any extrinsic evidence as to their authenticity or due execution.

[2] 1681, c. 10, Act. Parl. viii. 247.

[3] 1681, c. 11, Act. Parl. viii. 248.

[4] 1681, c. 17, Act. Parl. viii. 351.

a bankrupt's lands at a judicial sale right to enter with the superior on payment of a year's rent, and regulated the procedure at such sales, which were to take place before the Court of Session, and formed the ordinary mode of converting a bankrupt's lands for payment of his debts, till superseded in practice by the sequestration Acts of the present century. A fourth[1] Act conferred the privilege of summary diligence or execution on foreign bills, being the earliest of the series of statutes which have given the creditors in these shorthand commercial writings shorthand judicial remedies.

But it may be doubted whether all this beneficial legislation atoned for the evil consequences of the Test Act. When it came to be considered, it was seen by all parties to be a mass of inconsistencies, which neither Papist, Episcopalian, nor Presbyterian could honestly sign.

This made it, however, in the hands of the Duke of York and his advisers, only a more pliable instrument of tyranny, a shelter for the lax, and a terror to the upright conscience.

It received a speedy approval from the King, and was immediately put in force. Argyle, who declared that he took it only in so far as it was consistent with itself and the Protestant religion, was committed to prison, tried, and condemned to death for treason and leasing making,[2] but escaped from the

[1] 1681, c. 20, Act. Parl. viii. 352.

[2] 12th and 13th December 1681. "The Earl of Argyll's process took up thir two days at the Criminal Court, where the libel is found relevant by the Justiciar to infer treason; and it being proven that he gave in that explanation which they found treasonable 4th November 1681, the assize being so determined by the interlocutor, could not but find him guilty of treason or leasing making; but assoilzied him from the article of perjury. There was a great outcry against the criminal judges for their timorous dishonesty. The Marquis of Montrose was Chancellor of the assize. Sir George Lockhart called it lucrative treason to the advantage of Church and State, and *admired how a man could be condemned as a traitor for saying he will endeavour all amendments he can to the advantage of Church and State. For this is not to conspire in necem et perniciem reipublicæ.*"—Fountainhall, *Dec.* i. 166.

Castle of Edinburgh before the day fixed for his execution. The most momentous state trial in Scotland since Lord Balmerino's, it played a somewhat similar part in the second as that had done in the first fall of the Stuart dynasty.

Stair, warned by the fate impending on Argyle, had fled to London, hoping to be admitted to an audience with the King, but this was denied him, the Duke of York having sent Colonel Graham, his privy-purse bearer, post to Court, to prevent his being received.[1] Before he arrived a new Commission for the Court of Session had been received, in which Sir George Gordon of Haddo, afterwards Lord Aberdeen, was named President in his stead. He then returned to Scotland, where he lived in retirement at his country-seat of Carscreoch, in Galloway, employing his leisure in the preparation for publication[2] of his *Institutions of the Law of Scotland.* But the contents and character of this work require separate consideration.

[1] Somers *Tracts*, Scott's ed. xi. p. 552: Impartial Narrative. On 2d October 1681 Sir George Mackenzie of Tarbet, afterwards Lord Clerk Register, writes to Lord Aberdeen :—"My Lord,—The President is gone up and sent his excuse to the Duke by Sir John his sonne, *ex post facto.* The Duke takes this carriage ill, and hath writt up relating to it."—Aberdeen Letters.

[2] The royal license for printing the *Institutions* was obtained on 11th April 1681, but the work was probably not published till the autumn.

CHAPTER VIII.

1681.

Publication of the *Institutions of the Law of Scotland* at Edinburgh in 1681—Composition of the Work—Use made in it of the Decisions collected by Stair, and afterwards published—Aim of the Work—Difference in Arrangement of First Edition and Second Edition of 1693—*Modus Litigandi* on Forms of Process—His position that Rights are the object of Law, new and important—His Definition of Law as Reason versant about the Rights of Men—Rights divided by him into Personal Liberty, Dominion, and Obligations—Obligations divided into those by Engagements and Obediential Obligations—Criticism of this Division—How far he follows the Civil Law and the Feudal Law—Treatment of Commercial Law—Analysis of the Contents of the *Institutions*—Estimate of its Value—Comparison of it with the Institutional Works of Sir George Mackenzie, Lord Bankton, Mr. Erskine, and Mr. Bell.

THE first edition of the "*Institutions of the Law of Scotland*, deduced from its Originals, and collated with the Civil, Canon and Feudal Laws, and with the Customs of neighbouring Nations," was published at Edinburgh in 1681, when Stair had quitted the office of President, but before his retreat to Holland.[1] His contract with Anderson, the printer, dated 26th March 1681, has been preserved by Dallas of St. Martin's as a style for copyright contracts.[2] The work had probably existed in manuscript for some time. Indeed of the last part, which treats of the form of process observed before the Lords of Council and Session in Scotland, and is published with a

[1] He says, indeed, in the preface to the second edition, "The former edition was printed when I was absent;" but this must mean only absent from Edinburgh, for, in a letter to Lord Queensberry, dated 1st July 1682, he mentions having sent him a copy of the work.

[2] As it is probably one of the earliest existing in Scotland, I have printed it at the close of this chapter.

separate title-page, there is a MS.[1] in the Advocates' Library which bears the date 1667. The Decisions, which were included in the same contract with the printer, but were not published for some years, had been written out daily during his twenty years on the bench, and are copiously used throughout his Institutions to confirm or qualify his positions. "I have omitted," he says in the preface to the second edition, "no material decisions of the Lords that I found, *especially where they were contrary and seemed inconsistent, that judges might not be overruled by adducing some decisions where others about the same time were opposite.*" In his dedication to Charles II., with the tempered modesty of conscious merit, he observes,—"It is but little short of forty years since I have followed the study and practice of law constantly and diligently, so that those who will not deny me reason and capacity can hardly deny my knowledge and experience on the subject I write of. My

[1] The author of the *Impartial Account of some of the Transactions in Scotland*, etc., published in 1695, who seems to have had private sources of information, says,—"Then (*i.e.* 1664) it was he began to compose *a system of the civil law, intermixt with the law of Scotland*, and practices and precedents of that sovereign Court which makes the law intelligible and known to all the king's subjects there who can read English."—Somers *Tracts*, Scott's ed. xi. 550. In the MSS., Advocates' Library, 25. 7. 9, is a volume containing—

(1.) The form of process, or the order of proceeding of legal actions and affaires in session at Edinburgh. By the Right Honourable my Lord of Staires, President thereof, anno 1667.

(2.) A Compend or Breviarie of the most substantial points relating to the Law, extracted forth of the bookes of the learned jurisconsult D. T. C. Treating upon the Feudal Law.

Stair was not President until 1671, so the MS., which is written in a neat and distinct hand, must be of later date. The form of process is substantially the same as the *Modus Litigandi*, published as the third part of the 1st edition of the *Institutes*, with this distinction, that there is no reference in it to the Act of the Regulations, which is frequently referred to in the *Modus Litigandi*. This Act was sanctioned by Parliament in 1672; but there had been a previous interim Report of the Commission sanctioned by Act of Sederunt in 1670, to which also there is no reference in the MS. Hence it follows that the MS. must have been composed prior to 1670, and I am disposed to believe it a copy of an earlier MS. dated 1667, perhaps written by Stair himself, but copied after he became President without alteration.

modesty did not permit me to publish it, lest it should be judicially cited where I sat. But now, becoming old, I have been prevailed with to print it while I might oversee the press. It was not vanity and ambition that set me on work; but being so long a servant to God and your Majesty in the matter of justice, I thought it my duty not to smother my thoughts of the immaculate righteousness of God Almighty in his moral law, and of the justness and fitness of your Majesty's laws, that I might promote your honour and service, and the good of your subjects."

The title of the book bore witness to the high aim of its author. It was not, as most law books in this country, a mere compendium of existing municipal law. It was a deduction of that law from its original sources. "The historical part," he says, "relating to the helps and impediments for clearing and securing the rights of men out of the Word of God, the moral and judicial law contained therein, the civil, canon, and feudal laws, and many customs of the neighbouring nations digested as they fall in with the common rules of justice, may probably be acceptable to those who may and will allow time for its perusal."

And it was, in addition, an essay in comparative jurisprudence, before that name had been given to the branch of this science which treats of what is common and what peculiar in the laws of different countries. The uses of this study both to the general jurist and the municipal practitioner have seldom been better expressed than in the words of Stair: "A great part of what is here offered is common to most civil nations, and is not likely to be displeasing to the judicious and sober anywhere, who doat, not so much on their own customs, as to think that none else are worthy of their notice." "No man," he adds in another place, "can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world, from whence the interpre-

tation, extension, and limitations of all statutes and customs must be brought."[1]

The method of the treatise was original. In the first edition it was divided into three parts. The first dealt with the constitution and nature of rights; the second with their conveyance or translation from one person to another, whether among the living (*inter vivos*) or from the dead (*mortis causâ*); the third of the cognition (or enforcement) of rights by judicial process and execution, but the *Modus Litigandi* which forms this part is evidently only a sketch of what Stair deemed should be included in it.

The same method is substantially retained in the second edition, published in 1693,[2] with the variation that he divided the first part into two, and thus made four books, treating—

1. Original Personal Rights.
2. Original Real Rights.
3. Conveyance or Transmission of both.
4. Cognition and Execution of the whole.

The fourth book is a great expansion of the *Modus Litigandi*, and is in effect a treatise on procedure, evidence and diligence, or the forms of executing legal process.

The changes in other parts chiefly consist of sub-divisions of several of the chapters, and careful revision of the whole, with some slight additions; but there is no alteration in the conception or phraseology of the work.

The new arrangement in four books was made partly to follow the form of Justinian's *Institutes*, but principally because

[1] *Inst.* i. 1.

[2] "In all which there is no material change from what was in the first edition as things then stood, so that it will still be useful, and the titles may be cited either by that or this edition. Though, indeed, this edition be in a great part new, by occasion of new Statutes of Parliament, Acts of Sederunt, and Decisions since the treatise was written, and by an entire addition to the fourth part, which was resolved and expressed to be added; and yet it is still the same treatise, and therefore I thought it not proper to give it a new dedication."—*Preface to Second Edition.*

"there is an eminent distinction[1] in our law betwixt heritable rights of that ground and moveable rights."

An important advance was made in jurisprudence by the position which Stair postulates at the commencement of his treatise, that rights are the proper object of law. In this he advisedly deviates from the system of the Roman law, according to which persons, things, and actions were the object of law. "Omne jus quo utimur," writes Gaius, who more than Justinian or Tribonian was the true founder of that law, so far as that title can be given to any one man, "vel ad personas vel ad res vel ad actiones pertinet." This division of law was due to the social relations which prevailed both when Gaius wrote and when the Institutes of Justinian were compiled,[2] and to the legal consequences of these relations. Rights of status, and, in particular, the rights of husband and wife, parent and child, master, slave, and freedman, affected all other departments of law; the law of property, the law of obligations, and the law of actions, as they existed in Roman jurisprudence, could not be properly understood without a preliminary consideration of the law relating to persons.[3] Stair's criticism on this classification is that persons, things,

[1] This distinction, due to the Feudal Law, has already been much narrowed, and is destined probably to be entirely removed. Every step taken in that direction renders modern law more similar to the Roman law, in which this distinction was unknown.

[2] Gaius wrote in the reign of Antoninus Pius, A.D. 138-161. The Institutes of Justinian were composed by Tribonian, Theophilus, and Dorotheus, A.D. 530.

[3] See on this subject Maine's *Ancient Law*, 168, *et seq.*: "Starting as from one terminus of history from a condition of society in which all the relations of persons are summed up in the relations of family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of the individual; . . . the movement of the progressive societies has hitherto been a movement from *Status to Contract*." Mr. M'Lennan and other writers have, however, shown that there was an earlier stage when the family relation as it appears in the Roman law was unknown.

and actions are only the extrinsic object and matter with which law and rights are versant.[1] In other words, the direct or intrinsic object of law is rights, or, to use his own pregnant definition, "LAW IS REASON ITSELF AS IT IS VERSANT ABOUT THE RIGHTS OF MAN."[2] In truth, however, as the analysis[3] of the modern German jurists has shown, every legal right involves each of these three elements, a *person* who is entitled to the right, a *thing* (either a particular piece of property, or a claim upon the property, or to an act or forbearance of another person), which is the subject-matter of the right, and an *action* which is the means the law affords for the protection of property or the enforcement of claims. But while the Roman system may be defended by and easily adapted to this analysis, it would be an anachronism to suppose the Roman jurists had it in view. Stair, on the other hand, without explicitly stating it, very clearly recognises it. "A right," he says, "is a power given by the law of disposing of things, or exacting from persons that which they are due,"[4] and "an action is a prosecution by any party of their right in order to a judicial determination thereof."[5]

His division of rights into personal liberty, dominion or rights of property, and obligations, *i.e.* the personal rights to which obligations are correlative, is substantially that of most modern legal systems, and is as accurate as it is simple.

[1] *Inst.* i. 1. 23. [2] *Inst.* i. 1. 17.

[3] This analysis is by many persons in this country attributed to Austin, but that author had learned it from the Germans, and although it well suited the analytic vein of the disciple of Bentham, it has nothing to do with the utilitarian philosophy. It may be found in Kant; but I do not remember to have seen it stated in any of the writings of Bentham himself, though it would be natural to expect it.

[4] *Inst.* i. 1. 23. The Roman law taketh up for its object persons, things, and actions, and according to these orders itself; but these are only the intrinsic object and matter about which law and right are versant. But the proper object is the right itself, whether it concerns persons, things, or actions, and according to the several rights and their natural order ought to be the order of jurisprudence.

[5] *Inst.* iv. 3. 20.

On the other hand, his divisions of obligations, which he considers in the light of restraints on personal liberty, into those which arise from obedience—by which he means obedience to God—and those which arise from engagement, is peculiar; and though it is repeated by Erskine, and has been occasionally used by Scotch lawyers since, does not appear to be satisfactory. Under the former, or obediential obligations, Stair classes two distinct kinds of rights: (1) those rights which are now commonly said to belong to or arise from the personal and domestic relations—the rights of husband and wife, parent and child, guardian and ward; and (2) those rights which the Roman lawyers said arise from Quasi Contract Delict and Quasi Delict, and which Stair very conveniently subdivides into the rights of Recompence, Reparation, and Restitution. It is indeed true that all these various kinds of rights, with the partial exception of certain rights arising from the relations of husband and wife, and guardian and ward, are rights independent of express engagement or consent of the persons subject to the relative obligations; and it is useful to direct attention to this fact. But it is not true that such rights are distinguished from other rights in being based in a peculiar manner on obedience to God. All rights, both those arising with the consent, and those arising without the consent of the persons subject to the obligations, are founded on the will or law of the Supreme Ruler; and it is an error to suppose that the obligation to repair an injury is so founded in any other or higher sense than the obligation to perform a promise or fulfil a contract. The real state of the case appears to be that the former class of those obligations, which Stair styles obediential, are the result of the implied consent of the persons who enter into the relations in which they arise. The husband and wife, by marriage—the guardian, by the acceptance of his office—the parent, by causing the birth of the child—tacitly consent to all the obligations which the law imposes on the persons who

assume these relations, just as the law, in many less complex relations, implies obligations to which the contracting parties do not explicitly consent; as for instance, a warranty of fitness of the subject sold for the purpose for which it is sold, is implied in sale, though not expressed.

On the other hand, in the latter class of so-called obediential obligations, Recompence, Reparation, Restitution, there is no consent, either express or implied; but the law, in certain cases, imposes, contrary to, or at all events without the consent of the person subject to it, the obligation to recompense a benefit, to repair an injury, to restore what is not his own.

It follows that the true division of obligations in a treatise on Municipal Law is not into those which arise from obedience and those which arise from engagement, but into those which arise with the consent of the persons subject to the obligations, which may be either express or implied, and those which arise without their consent by law.

It is, of course, not inconsistent with this view, that antecedent to, or independent of, any particular human law God had revealed, or reason, the highest faculty of man, had recognised, certain rights as necessary. The ascertainment of what these necessary rights are is the proper province of the Philosophy of Law.

When we pass from Stair's general divisions to his treatment of particular subjects, what is chiefly to be remarked is the different bulk and relative importance of the commercial branches of the law at the time he wrote and in the present day. Thus Bills of Exchange are only treated incidentally under the title of loan or mutuum.[1] Trust,[2] one of the most important departments of modern law, in the same manner, is considered as a subordinate species of mandate, and it is observable that, like mandate, it was capable of being proved by witnesses until the Act 1696, c. 25, restricted the proof to writ

[1] *Inst.* i. 11. 7.

[2] *Inst.* i. 12. 17.

or oath—a restriction which probably ought now to be removed. The Contract of Partnership is treated in one of the briefest chapters under the name of Society. Insurance is only once mentioned as an unusual contract "where money or things are given for the hazard of anything that is in danger, whether it be goods or persons." In short, although commerce in Scotland was beginning to spread its wings, its more complex contracts and usages were known only as forms of the simpler contracts between man and man, and did not occupy separate places in the scheme of jurisprudence.[1]

In this part of his work, as well as in that which treats of Restitution, Reparation, and Recompence, Stair follows closely the civil law of Rome. He uses its nomenclature, as Mutuum, Commodatum, Mandate, Depositum, Emption, Vendition, Location and Conduction, Acceptilation, Compensation, Retention, Innovation, Confusion. Under Restitution he treats of Indebitum Solutum, Bona Fide Consumption, the Actiones Familiæ Erciscundæ, Communi Dividundo, and Finium Regundorum; under Recompence, of Negotiorum gestio, the Actio de in rem verso, and the Lex Rhodia de jactu; under Reparation, of Vis et Metus, the Edict of the Prætor de dolo malo, and the Actiones Redhibitoria, Quanti Minoris and Pauliana. In almost every case, however, he gives equivalents for such terms in the vulgar tongue, and is careful to point out that the Roman law is of no authority in Scotland, but is received only on account of its equity and expediency, and where there is no positive law or settled custom.[2] This

[1] But while this circumstance deprives this portion of the *Institutions* of value as a detailed statement of the law, it has the advantage of fixing the eye on the elements out of which the more complicated legal relations of modern society have grown, and into which they may be resolved.

[2] *Inst.* i. 1. 16: "Our customs, as they have arisen mainly from equity, so they are also from the civil, canon, and feudal laws, from which the terms, tenor, and forms of them are much borrowed, and therefore these, *especially the civil law*, have great weight with us, namely in cases where a

use of Roman phraseology by its chief classic, who has been followed by his successors, has preserved it in Scotch law down to the present day, and given it what English lawyers unacquainted with the civil law, sometimes consider a barbarous aspect.

In the Second Book, where he treats of Rights Real or Dominion, the opening chapter on Community, Possession, and Property, continues in the traces of the Roman law, especially in dealing with Possession and the Acquisition of Property by the various modes of Appropriation Occupation, Accession Alluvion in immoveable, and Commixtion Conjunction and Contexture in moveable subjects. As soon, however, as he passes to Real Property, the feudal instead of the civil law becomes the basis of his treatise. He notices, indeed, the few instances in which the feudal system had not laid its strong hand on Scotch land rights, the udal or allodial tenure,[1] and the vestiges of the original community of property in the common use of ways and passages both by land and water and the property of the sea-shore; but, practically, the whole land of Scotland, when he wrote, was subject to a uniform system of feudal tenure stretching from the sovereign, in whom was all land not specially granted, as well as the superiority of all land granted through a chain of vassals, to the last subvassal, who was the actual dominus, or proprietor, of the portion of land contained in his grant; though, according to feudal theory, each superior retained a reserved right called dominium directum, which might at any time become full property, if the vassal neglected or while he was incompetent to fulfil his obligations. Although Stair's remark is probably true, that the details and practical application of this theory

custom is not yet formed. But none of these have, with us, the authority of law, and therefore are only received according to their equity and expediency—secundum bonum et aequum."

[1] *Inst.* ii. 1. 5.

had not been settled till the institution of the Court of Session, whose decisions reduced to uniformity the diversities of different parts of the kingdom, its principles had been accepted at least since the reign of Malcolm Canmore, and the absence of particular customs in Scotland (such as Copyhold,[1] Borough English and Gavelkind, in England), and the retention, except in the case of burgage tenure, of Subinfeudation (abolished in England by the statute Quia Emptores), and of a system of jurisdiction both in Parliament and the Courts of the Lords of Regality and Barons, founded on the relation of superior and vassal,[2] rendered Scotch feudalism singularly complete.[3] Stair first treats of infeftment or sasine, the act of investiture, accompanied by symbolical delivery, by which the superior transferred possession to the vassal. This gives him occasion to explain the nature of Charters, both original and by progress, whether upon Resignation, or by Confirmation, or by Apprising or Adjudication, along with some of the principal clauses of Charters, the Dispositive, the Precept of Sasine, the Tenendas, and the Novodamus. He then notices the Instrument of Sasine, first introduced by James I. in 1430, after his return from England, before which the symbolical delivery of possession completed the vassal's right without a written instrument recording it; and the system of Registration of such In-

[1] Analogous, however, to the English Copyhold is the Booking Tenure of Paisley and that of the kindly Tenants or Rentallers of Lochmaben, but the limited local extent of such customs only shows, more strikingly than their total absence would have done, the uniformity of the Scotch land law.

[2] ii. 3. 2. "No nation is more exact in this than Scotland, wherein the king, as supreme superior, ruleth by his vassals assembled in Parliament. So also superiors have their Courts consisting of those vassals who are obliged to answer suit thereto, who, as a jury, gave doom and judgment of old, when all matters proceeded by jury or inquest."

[3] "The Scottish Parliament must have been the purest piece of feudalism in the world; more so than the States-General, and more so even than the Aragonese Cortes." I quote this from a letter of Professor W. Stubbs of Oxford, a high authority on such a point. No wonder, then, the law this Parliament made is stamped deeply with a feudal impress.

struments introduced by "that excellent Statute 1617, c. 16," in connexion with which he makes a slight digression to mention the other statutes requiring registration of Adjudications,[1] Inhibitions,[2] and Hornings.[3]

After distinguishing base Infeftments, where the vassal holds of the immediate granter, and has not been received by confirmation or on resignation or by adjudication by the granter's superior from public Infeftments, where he has been so received or entered, he proceeds to explain the five forms of tenure known in Scotland,—Ward, the original feudal or proper military tenure, similar to the English knight's service; Blench, the tenure in which nominal service took the place of military; Mortification, Burgage, and Feu-farm, the three tenures by which the Church, the Burgh, and the Agricultural Tenant modified, while they imitated, the strict feudal forms, and adapted them to the progress of civilisation.

He then treats of conjunct infeftments, where more than one person hold the property jointly; and of tailzies or destinations, where certain heirs are nominated and accepted by the superior in succession to the original vassal. He concludes this chapter with a consideration of the most ordinary and important clauses in infeftments, the union of various parcels of land into one tenement, their erection into a barony, warrandice, reservations, provisions, conditions, and clauses irritant.

In connexion with the last of these, he mentions the debate of the feudists, whether such clauses were lawful, and in his second edition its resolution in the affirmative by the Act 1685, c. 22, and his own adverse opinion, founded, not on the technical feudal ground that they are inconsistent with the right of property, but on those reasons of common sense which have since led to the relaxation of strict entail, and prepared the way for its total abolition. "Clauses de non alienando or non contrahendo debitum are most unfavourable and inconvenient,

[1] 1661, c. 31, and 1672, c. 19. [2] 1581, c. 119. [3] 1579, c. 75.

especially when absolute; for, *first*, commerce is thereby hindered, which is the common interest of all mankind; *secondly*, the natural obligations of providing wives and children are thereby hindered, which cannot lawfully be omitted; *thirdly*, it is unreasonable so to clog estates descending from predecessors, and not to leave our successors in the same freedom that our predecessors left us, whereby, though they have the shadow of an estate, yet they may become miserable;"[1] although he allows such entails to be more tolerable where the lands have been acquired by the entailer. The chapter ends with an account of the Regalia, distinguished into those always reserved and those carried by implication on the grant of a barony, and requiring express words where there is no such grant, and of what is comprehended under Part and Pertinent.

After treating of the right of superiority as correlative to that which the vassal acquires by infeftment, and its various casualties or incidents, Stair proceeds to consider, in a series of chapters, the different classes of real rights, which are less or more limited than the full right of property or dominion.

1. Liferent infeftments, including conjunct fees, terces, and liferents by the courtesy, which correspond in the feudal to the personal servitudes of the civil law.

2. Real servitudes, which are in part the same as in the civil law, as those relating to water, light, and passage, and in part derived from the feudal law or custom, as pasturage and the onerous servitude of Thirlage,[2] by which the servient tene-

[1] *Inst.* ii. 3. 58. Cf. iv. 18. 6.

[2] The historical origin of the Scotch thirlage is uncertain. The word multure (*mouture*) points to France, and it was in that country that the oppressive rights of the seigneur (droit de banalité) had the widest extent and longest existence. On the other hand, the word thirlage itself, the terms sucken, knaveship, and the distinction of in-town and out-town multures, indicate rather a Saxon or Scandinavian origin, and there are notices of the right in some of our earliest laws (see Balfour's *Practics*, p. 493

ment was bound to send its grain to the mill of the dominant.

3. Teinds, or tithes, of which his account is peculiarly valuable for its historical information and the knowledge derived from his acting on the Commission of Teinds.

4. Tacks, or leases, which became a real right by the Statute 1449, c. 18, contrary to the rule of the civil law;[1] and—

5. Wadsets or mortgages of land in security for debt.

The second Book concludes with an account of the various modes by which real rights of property or infeftments may be extinguished, whether with consent of the vassal in Resignation to the superior (called *ad remanentiam*), or by law as in Recognition, Purpresture, and Disclamation; to which is added a separate and important chapter on Prescription treated by itself, because it is a mode of extinguishing other rights as well as real rights. This subject is discussed with great subtlety; the disquisition in it on *bona fides* well deserves to be studied by all lawyers, and the exposition of the various statutes introducing the different prescriptions by all Scotch lawyers.

The third Book relates to the Conveyance or Transmission of Rights,—that branch of law which is known in modern practice as Conveyancing; and it would be well if modern professors of this branch of law confined themselves to their proper limits, and followed the lucid division of it which Stair lays down. He treats successively (1) of the transmission, amongst the living, of Personal Rights by Assignation; (2)

et seq.), which prove its existence before French influence had begun to operate. Probably the explanation is that it was a common feudal institution existing in Scotland as in other feudal countries, but which received greater definiteness and tenacity in Scotland in consequence of the French connexion. It is singular that there is little trace of it in England.—See on this subject Ross's *Lectures*, ii. 169.

[1] By that law, sale by the landlord or lessor terminated the right of the tenant or lessee under him—as the German proverb expresses it, *Kauf bricht Mieth.*

of Real Rights by Disposition; and (3) of both by Confiscation or Forfeiture; then of the transmission from the dead to the living, which in Real rights is by heirs, and in the succession to Moveable rights is by executors or next of kin.

Under the head of Succession he discusses the various classes of heirs: Heirs of line, or by course of law; heirs of tailzie and provision, who cut that line by the provision of the proprietor; and heirs of conquest, who succeed in *Feuda Nova*, a name by which the feudal law designated all lands not acquired by the deceased proprietor by way of succession as heir, but by purchase or by gift. He also treats, under this title, of the various modes by which an heir incurs a passive title and makes up an active title to land; and, in particular, of the Brieves of Service, which or an equivalent, the law of Scotland, like the ancient, and unlike the modern English law, requires to complete the heir's title in feudal subjects. In consequence of Stair's full treatment of this subject, his contemporary, Dallas of St. Martins, the earliest Scotch writer on Conveyancing, omits it. "Being informed," he says, "that James, Viscount of Stair, that great and learned lawyer and President of the Session, had undertaken that task (how to answer all parts of the brief), and actually did perform his design (which I see before printing of my present Stiles), I omit what I proposed to myself in that, and refer you to his Lordship's late *Institutions*, pages 467, 468, 469 (and look his Index), wherein ye will find their various kinds, natures, and manners of proceeding therein very fully and lively digested, and wherein he shews himself not only a Lawer, but a great Formalist and Stylist (as if bred Writer to the Signet), and sure not without (if not with) the greatest pains and search of and prying in these matters. *And in evidence of his ardent desire to be versed in all matters he had from me the first part of my system of Stiles called Real and Personal Diligence, and my third part being Summonds, passing the Signet, the first*

whereof he kept eight months, the other four or five months, and returned them without amendments, and his revising of them in more esteem with me than the sending."[1]

The *Stiles* of Dallas were published in 1697, after Stair's death ; so the above passage was no mere compliment to the head of the Court, and affords a strong testimony to the assiduity of Stair in every part, even the least interesting, of his undertaking.

There follows a more complete discussion of the so-called passive title or *gestio pro hærede,* by which an heir who has not made up his title in the formal manner required by law, but has intermeddled with the land of the deceased, is liable for his debts and obligations. The third Book ends with two chapters on Executry, where testaments or wills are treated with great minuteness, and Vitious Intromission, which is the passive title in moveable succession.

The fourth Book is a peculiarly valuable portion of the treatise. It commences with a chapter on the Authority of the Lords of Session, which traces historically the origin of the Court from the Session of James I., through the Daily Council of James IV., to its institution by James V. in 1532,[2] then explains its jurisdiction both as an original and appellate Court, declaring, as might be anticipated from the part we have seen Stair took in the great controversy on the subject, against the Competency of Appeals from it to Parliament except in cases of excess of jurisdiction, and concludes with an account of the powers and duties of the Quorum of the whole Court, and of the Lords Ordinary who sat singly in the Outer House.

In the second chapter the Order of Discussing Processes

[1] See also the continuation of this passage, Dallas, pp. 886 and 894, for further notices of Stair's work.

[2] Stair shared the common error of supposing the date of the foundation of the Court to be 1537. The true date is 1532. See Act. Parl. ii. 335, and Erskine, i. 3. 12.

is treated with that attention to minutiæ which the lawyer knows to be necessary for the proper conduct of business, and which must have made it a useful guide to the practitioner of the time when it was written, though it is now, for the most part, obsolete. He here points out the various improvements introduced in procedure in his time to the advantage of the parties, but which, as with a slight touch of querulousness, he observes, added greatly to the burdens of the Lords. Having in view, doubtless, the attacks so freely made on the Court, he appeals confidently to his account of its procedure as showing "that if it be compared with the Supreme Courts that have been or are in other nations, there will be found no reason to repent or be ashamed of that great deference that this nation hath always had to the Session since the institution of the College of Justice, and that *they are not the best friends to the nation who would diminish or derogate from the authority or honour thereof.*"

In the third chapter he passes to the Application of Justice by Judgment. He observes that he treats only of the Supreme Court, but points out in a passage which has not lost its application in the present day: "It would be of great advantage to the nation that all who attend the inferior judicatures were first advocates who, for a considerable time, had attended the house and practised; which would be a great means to keep all the Courts, Superior and Inferior, uniform for preventing the trouble and expenses of the lieges; and where the inferior magistrates do not themselves ordinarily attend, they might elect their deputes of such. *This would also incourage the study of law, to which many of our youth are inclinable, whereby they arise to a greater number than that the affairs of the nation can afford suitable provisions to their spirits and parts.*"

He remarks that the main distinction between the Supreme and Inferior Courts is the existence of an equitable jurisdiction in the former, the nature of which he explains by comparison

with that of the English Chancellor and that of the Roman Prætor, and by stating the various points in which it is exercised.

He then treats of the different forms and divisions of brieves introduced by James I., from the practice of the English Chancery, and of the division of actions into solemn and summary, and concludes with an epitome of the chief divisions and classes of actions according to the Roman and the Scotch law respectively.

The chief division of actions according to the Scotch law, he remarks, is into declaratory, petitory, and possessory, and he proceeds to discuss consecutively the various kinds of declaratory, petitory, and possessory actions. Under each of these divisions he follows the order of the rights contained in the former books of his Treatise. Thus, under Declarators, he treats—1. Declarators relative to property, the redemption of property, and the trust of property; 2. Declarators relative to superiority, which comprise the declarator of the forfeiture or tinsel of the superior's right, and declarators of the various casualties of the superior, to which are appended the declarator of bastardy, and of the King's right as *ultimus hæres;* 3. Declarators of Servitudes, including astrictions in the law of thirlage; 4. Actions to compel the Pursuer to Insist and Multiplepoindings, both of which are declaratory actions relative to moveables.

In connexion with Declarators, he devotes a special chapter to Reductions, which are negative declarators, by means of which pretended rights are annulled.

In regard to this peculiar form of declaratory actions, he observes that it was "invented and sustained since the erection of the College of Justice, and is a more absolute security of man's rights than any form of process in the Roman law, or in any neighbouring nation," a commendation which has been echoed since by English lawyers not disposed to find merits in the Scotch system of procedure.

Petitory actions are next treated, being those in which something is demanded to be decerned by the judge to "be done by the defenders, which doth not arise from possession," both those arising from real and those arising from personal rights.

Possessory actions follow where the division of real and personal rights is again used,—the possessory actions arising from real rights being removings, molestations (the *actio finium regundorum* of the Roman law), ejection and intrusion (the successor of the writ of disseisin of the Feudal law) both of which last have in modern practice given place to interdicts. The possessory actions arising from moveable rights are spuilzies and wrongous intromissions.

The three preceding classes of actions are principal actions, and the accessory or incidental actions are next passed in review. These are Transcripts for taking copies of deeds, Provings of the Tenor for establishing the contents of lost deeds, Exhibitions for inspection of deeds, both by the heir for the purpose of determining whether he shall complete his title and by the litigant for the purpose of probation, Transferences where new pursuers and defenders have to be introduced into the record, and Wakenings where actions have fallen asleep, as by a curious figure (similar to that of the Roman law of *actio nata*), the Scotch law designated those in which no proceedings had been taken for a year. Most of these accessory actions have now been dispensed with, and the shorter and more convenient form of motions in the original cause substituted. Separate chapters are then devoted to the competition of diligences, and to extraordinary and summary actions and diligences during process.

The subject of evidence is next handled in four chapters, which in the present day would have formed a separate treatise: 1. Proof by writ; 2. Proof by witnesses; 3. Proof by oath; 4. Extraordinary means of proof; and, finally, after considering the decrees of the Court, the various forms of execution, lawburrows the preventive and deforcement the remedial

form of personal diligence, inhibition, arrestment, and adjudication, the diligences which affect property, as well as the manner of suspending executions are treated.

This long but necessarily rapid summary will, it is hoped, give to the reader who is ignorant of Stair's work a clue to its scope and contents. It forms a complete body of law or *Corpus Juris* for Scotland. The time for treatises on special subjects had fortunately not arrived, for such treatises rudely sever the subtle connexion which exists between the different parts of jurisprudence, and deprive each part of the illustrations it derives from the rest. A master mind was required, even when the law was less complex than it now is, to grasp the various parts, and unite them in a complete whole; but given such a mind, the work done is one that may endure, though many and even most of its parts should be altered by the changes which time brings to every system of positive jurisprudence—for it represents Scotch law as it existed when first moulded into shape by the great lawyers of the sixteenth and seventeenth centuries, from which the existing law has been and the future law will be developed. Perhaps the traits which most deserve admiration are the consummate order or arrangement of the work, which, once apprehended, can never be forgotten, and the concise clearness of the expression.

The learning of Stair is of the best sort, wide but exact, and never obtruded—rather leaving his extensive reading to be inferred than exhibiting it. With the civil law of Rome, the most perfect example of exact jurisprudence the world has seen, he is familiar both in its original sources and as treated by the best commentators of his time; but he never forgets how much it has been modified by Christian influences and the Canon law, and that it was not accepted in Scotland except as a model of juristic reasoning, and as a supplementary law where the municipal is defective.

The law of England he does not contemn with the pedantry

of professed ignorance, nor does he make a dangerous pretence of knowledge of it, but in the places where he quotes it uses it in illustration of or contrast with the custom and law of Scotland.

The philosophical and the religious ground or basis of positive law is frequently alluded to, but his treatise never loses itself in generalities; it is the work of a practical lawyer who deals with the rights of Scotchmen as fixed by the law to which they are subject. The decisions of the Court of which he had forty years' experience when he wrote his first edition, twenty as an advocate, ten as a judge, ten as its president, are his guideposts in every page, often in every line. He has no superstitious reverence for their authority, but he feels their importance in making the law constant and rights known and secure. His historical insight never fails, when he explains the bearing of ancient statutes or the limits of customs. The more modern Acts of Parliament he expounds with the close observation only possible to a judge who has also been a legislator. He sees law not as most lawyers from one or two points of view only, but as a law-giver who has watched and taken part in its formation, as an advocate who has tested it, as a judge who has applied it, as a writer who is expounding it. His opportunities had been unrivalled, and he used them all. Hence his *Institutions* will probably never be surpassed, for it is in the highest degree improbable that to equal talent, there will ever again be granted equal experience.

The effect of the work upon Scotch law can scarcely be exaggerated. Before it there had existed no treatise except that of Craig, which dealt only with the feudal branch, and in treating that borrowed much from the customs of other nations. Since its date four writers have essayed to cover the whole field of Scottish jurisprudence: Sir George Mackenzie, Lord Bankton, Mr. Erskine, and Mr. Bell. The work of Mackenzie[1] is slight, of

[1] Mackenzie's *Institutions of the Law of Scotland* were first published in 1684.

much less value than his *Observations on the Statutes*, and completely overshadowed by the *Institutions* of Stair, though it must have been useful as an introduction to that treatise for the young lawyers of the age in which its was written. The *Institute* of Lord Bankton[1] is more elaborate, but has never acquired a high authority, being chiefly referred to for the sections in which he has compared the law of Scotland with that of England.

Erskine's *Institute*,[2] published twenty years after that of Bankton, has better stood the test of time. It was written at a period when both the substance of the law and legal phraseology had approached much more nearly than in the time of Stair their present state; when, to mention two points, heritable jurisdictions had been abolished, and the foundations of commercial law had been laid in the practice of merchants and the precedents of the Court. The education of lawyers also was then no longer based exclusively on the civil and feudal laws, but the municipal law of Scotland, of which Erskine was professor, had become the chief subject of study. His work is peculiarly adapted to the tendencies of the Scotch intellect: plain rather than subtle, sure so far as he goes rather than going to the bottom of the subject, he is the lawyer of common sense, less antiquarian, and therefore now more practical, but also less philosophical and less learned than Stair.

Mr. Bell, like Mr. Erskine, a professor of the municipal law, was a lawyer of the same school; but he had the great advantage of a more intimate acquaintance with practice, and of a wider reading which embraced English case-law and the works of the leading modern continental jurists. If Stair be taken as the type of the philosophical and Erskine of the common-sense

[1] *An Institute of the Law of Scotland in Civil Rights*, with observations upon the agreement and diversity between them and the laws of England, 1751-3.

[2] *An Institute of the Law of Scotland*, in four books, in the order of Sir George Mackenzie's *Institutions* of that law, first published 1773.

lawyer, Mr. Bell may perhaps be styled the lawyer of precedent. Both his Principles [1] and his Commentaries [2] are admirable repertories of the decided cases, the points established by them, the distinctions and the conflicts between them, and the principles to be collected from them. It would not be difficult to turn the former treatise into a code of Scotch law, and to do so would be a useful work. No stronger proof could be afforded of the sterling worth of the *Institutions* of Stair, than that while both the great lawyers we have last mentioned largely used his work, and wrote so much nearer our own time, they are so far from superseding it, that whenever search has to be made for the ultimate principles of those parts of the law he treated, or their historical origin has to be traced, recourse must still be had to his *Institutions*.

APPENDIX.

RATIFICATION in favours of Sir J. D. *of S. Knight and Baronet, President of the Session, of the Contract past betwixt his Lordship and* P. T. *and* A. C. *his Spouse, for Printing the Acts of Sederunt, and Decisions of the Lords of Session, and Index thereof, the Institutions of the Law of* Scotland *first & second Part, with the form of process, with a Treatise, containing four Inquiries concerning* Humane Knowledge, Natural Theologie, Morality *and* Phisiologie.

OUR SOVEREIGN LORD Ordains a Letter to be past under His Majesties Privy Seal, in due Form, bearing; That whereas, Sir *J. D.* of *S.* President of the Session, hath observed and written the Acts and Decisions of the Lords of Session since His Majesties

[1] *Principles of the Law of Scotland*, for the use of students in the University of Edinburgh, 1829.

[2] *Commentaries on the Law of Scotland*, and on the principles of Mercantile Jurisprudence considered in relation to bankruptcy, competitions of creditors, and imprisonment for debt. 1st ed. 1810, 5th and last author's ed. 1826.

happy Restauration to this time, and hath also written the Institutions of the Law of His Ancient Kingdom of *Scotland;* And His Majesty being well satisfied with his Pains and Diligence therein, and knowing his long Experience and Knowledge of the Laws and Customs of that Kingdom, and his constant Affection and Faithfulness to His Majesty, and being confident of the great Benefite may arise to all His Majesties Subjects of that his ancient Kingdom, by publishing of the saids Decisions and Institutions, and being willing to give to the said Sir *J.* all Incouragement therein; *Therefore* Ratefieing and Approving the Contract agreed upon betwixt the said Sir *J.* and *A. C.* and *P. T.* Merchant in *Edinburgh*, now her Spouse, having right to, and exercing the Office of His Majesties Printer in *Scotland*, for Printing of the saids Books, in all the Heads, Articles and Clauses therein contained, prohibiting all others to Print the saids Books for the space of nineteen years, without the special leave of the said *S. J.* his Heirs and Successors, of which Contract the Tenor follows (At *Edinburgh* the 26 day of *March* 16 fourescore one years: It is agreed, Contracted, and finally ended betwixt the Parties following, they are to say, *S. J. D.* of *S.* Knight and Baronet, President of the Session on the ane part, and *P. T.* Merchant Burgess of *Edinburgh*, and *A. C.* now his spouse on the other part, as after follows, *viz.* The said *S. J.* binds and obliges him, his Heirs and Successors, to deliver to the said P. and his said Spouse the several Manuscripts underwritten, or Copies thereof, to the effect the same may be Printed in manner after-mentioned, and that in due time, that the Press be not hindred, nor the said Work delayed, *viz.* The Acts of *Sederunt*, and Decisions of the Lords of Session observed by the said *S. J.* from the first of *June* 16 and sixty one years till this time, by the space of twenty years, together with the Index thereof, the Institutions of the Law of *Scotland*, the first and second Part, with the Form of Process before the Lords of Session, together with a Treatise containing four Inquiries concerning *Humane Knowledge*, *Natural Theologie*, *Morality and Phisiologie;* Likeas, the said *S. J.* binds and obliges him and his foresaids, not to give Copies or Warrands to Print or Re-print any of these saids Books, to any other person or persons, during the said *P.* his said Spouse and their Assigneys, continuing and exercing the Office of His Majesties Printer, with Power to them and their foresaids to Re-print the

saids Treatises, or any of them as they shall think fit or convenient: And upon the other Part, the said *P. T.* and *A. C.* his Spouse, and their Successors and Assigneys, binds and obliges them to Print, or cause be Printed upon the Letter called the *English Roman*, conform to the Printed Sheet subscribed by both Parties, of the date of thir presents, and shall begin the printing thereof immediatly; and sicklike the said P. his said Spouse, and their foresaids, binds and obliges them to Print six sheet thereof every Week, ay and while the saids haill Copies be perfected, the samen not being impeded by the presenting of the saids Treatises, or Copies thereof, or by correcting of the samen when printed; And if there should be more than six Sheets thereof perfected Weekly, then, and in that case, the said *S. J.* obliges him and his foresaids to cause the Correctors to be furnished by him, to dispatch the samen whensoever the samen shall come in their hands, and that in the mean time till the saids Books be fully Printed and compleated, the said *P.* his said Spouse and their foresaids, bind and oblige them, to give out no Duplicats of the saids Treatises, or any part thereof, nor suffer any Copies to be taken of the same till it be revised by him and his foresaids, or by any whom the said *S. J.* shall appoint, and to amend the samen accordingly; And to that effect the said *P.* his said Spouse and their foresaids, binds and obliges them to keep the written Copies, and printed Schedules of the saids Treatises under Lock and Key, in their own Custody, until the samen be fully printed, and that under the Pain of an Hundred *lib. Scots* for each Copy to be payed by them and their foresaids to the said *S. J.* and his foresaids, in case any written and printed Copies of the foresaid Books, or any part thereof be found out of their Custody as said is; Likeas, the said *P.* his said Spouse, and their foresaids, bind and oblige them to deliver to the said *S. J.* and his foresaids, the Number of Twelve of every one of the saids Treatises, well bound in Leather, the one half thereof being Guilded, and that so soon as the samen are perfected, whensoever he shal call for the samen, under the pain of 40 *lib. Scots* money, as the liquidat price thereof by Consent; And likeways the said *P.* his said Spouse, and their foresaids bind and oblige them to make use of the Priviledge granted to His Majesties Printers, and not to permit any other person whatsoever to incroach upon the said Priviledge granted to His Majesties

Printers, nor to suffer any other persons within this Kingdom or Printers therein, to make use of Printers abroad to Print or Re-print the saids Books, or any part thereof, or any Stationer, Merchant, or other person, to Sell, Vend, or Disperse the samen so printed by others, without the special leave and Consent of both the saids Parties Contractors, and their foresaids, in Write subscribed by them; And also, that they shall not suffer any person or persons whatsoever within this Kingdom to Print or Re-print the saids Books, or any of them, or any part of the samen, or to sell, Vend or Disperse them, and do hereby communicate the Benefite of the Penalties and Confiscations that they shall procure upon the Contraveeners of the said Priviledge, in printing the saids Books, or any part thereof, by any other than the said *P.* his saids Spouse and their foresaids, equally betwixt the saids Parties Contractors; And both Parties binds and obliges them to perform and fullfil the Premisses each of them their own parts to others, under the pain of 1000 Merks *Scots* money, by and attour performance of the Premisses; And for the more security, Both the saids Parties are content, and consents that thir presents be insert and Registrat in the Books of Council and Session, or in any other Judicatory Books competent, to have the Strength of an Decreet of either of the Judges thereof interponed thereto, that Letters of Horning on six days, and others Executorials necessary may be direct hereupon, in form as effeirs. *Given at the Court at* Whitehall *the* 11 *day of* April 1681, *and of his Majesties Reign the thirty third year.*

CHAPTER IX.

1681-1686.

Stair lives in retirement at Carscreoch in Galloway and Stair in Ayrshire—Commission granted to Claverhouse, as Sheriff of Wigton, to put down Conventicles, 1682—Letters from Stair to Lord Queensberry—Puts off proposal to wait upon Duke of York—Sends Queensberry a copy of the Institutions—Parties and Conventicles in Galloway—Claverhouse comes to Old Luce Parish—Conflict of Jurisdiction between him and Sir John Dalrymple, as Bailie of Regality—Sir John offers to buy off Regality from Claverhouse—Stair writes to Queensberry complaining of Claverhouse—Conceals himself, and flies to Holland to avoid prosecution, October 1682—Claverhouse and the Master of Stair make mutual complaints against each other before the Privy Council, which acquits Claverhouse and condemns the Master of Stair, who is deprived of his office as Bailie—Stair lives in Leyden—Description of that town and its University—Its Professors—Intercourse with Utrecht—Controversies of Aristotelians and Cartesians—Cocceians and Voetians—Other celebrated men in Holland—Spinoza—Bayle—Fagel—The Dutch Artists—General Activity and Industry of the Dutch—Scotch Exiles at this time in Holland described by Stewart of Coltness—Stair publishes first volume of his Decisions of the Court of Session—His diligence in noting Cases—His Decisions the first published—History of Scotch Law Reporting—Style of his Reports—Contrast between them and present Reports.

STAIR did not find in Galloway the quiet retirement his age and indifferent health made him desire.

On 31st January 1682, a Commission was issued by the Privy Council to Graham of Claverhouse, as Sheriff of Wigton. Power was given by it to call before him all persons in that shire guilty of withdrawing from the public ordinances in their parish churches since the Act of Indemnity, or guilty "of conventicles, disorderly baptisms and marriages, or harbouring and resetting rebels, and to enact the fines imposed by Parliament."[1] Claverhouse was already, with that prompt-

[1] Wodrow, iii. 370.

ness which distinguished him, on the scene of action, and had received a license from the Council to use a house or chapel belonging to John Dalrymple, Master of Stair, to keep guard in, as well as a house of Sir Robert Maxwell's at Kirkcudbright.[1]

In May he received the thanks of the Council for the zeal with which he was executing his office.

Stair was then residing sometimes at Carscreoch in Galloway, sometimes at his patrimonial seat of Stair in Ayrshire. On his return to Scotland he had been advised by Lord Queensberry, who then stood high in the favour of the King, having recently been created a Marquis, to wait upon the Duke of York. In the following letter, written from Stair on 15th February 1682, he expressed his willingness to do so, but his wish to put it off to a more convenient time :—

"My Lord,—I find myself still more and more obliged to your Lordship by the account I have from my son. I have long and still more firmly resolved that I and mine shall to our power be serviceable to your Lordship and your noble family to which we have the honour to be related. My son showed me your Lordship thought it would be fit I should wait upon the Duke. If your Lordship find it his Highness inclination, I shall not fail in it, but the beginning of April or end of March will be the fittest time. I have been so long from my affairs, that it requires a considerable time to put them in order. I have not been a month here these two years past. I am to be back in Galloway in a few days. Troops are gone in there, whereof I had no notice that they were to come, until I found them in this shire on their way thither. Provision is everywhere scarce this year for horses, but more there than anywhere." [2] . . . . . .

[1] Wodrow, iii. 370. Act of the Privy Council, 27th January 1682.

[2] Queensberry Papers quoted in Napier's *Memorials of the Viscount Dundee*, ii. 286, who says in a note, "There is more in the letter, but only

On the 1st of July he again writes to Queensberry from Carscreoch :—

"My Lord,—I have ordered one of my books lately printed to be presented to your Lordship as a token of my most sincere affection.[1] I had long resolved to retire before age should bring decay. I did see the example of my predecessor, Sir John Gilmour, and many others, whose spirits, though very pregnant, yet being long bended behoved to weaken, whereof themselves were not so sensible as others, and therefore I left this book behind me for the service of my Prince and country ; though I knew it might breed emulation and envy in others, *for it is hard in such a little country as this for a man to write, in his own life especially going off the stage without detraction, albeit a while after his time it would meet with favours from all.*

"Parties[2] have been much in this place of the county. If they had come two or three years sooner, neither they nor we would have heeded the trouble. For this little shire till then was all orderly, and quiet as any in Scotland. And indeed the people here have not a principle of separation. But parties coming to Dumfries on the one hand, and to Ayr on the other, forced the hill preachers into an angle, and people did gaze upon them as a novelty they had not seen. But generally they do frankly engage against conventicles, and to keep the Church, as, I believe, Claverhouse will signify. I have been much obliged to him for his civility ; and my son hath not much owned the interest of the regality of Glenluce, whereof he is heritable baillie infeft, express with the whole casualties, fines, and emoluments of the Court by a long tract of rights. There has

relating to the private affairs of the Master of Cathcart, who had married the ex-President's second daughter. 'It is an old family,' he says, 'and I have done much to preserve it.'"

[1] This, of course, refers to the *Institutions*.

[2] "Parties" were the troops sent to suppress conventicles.

been decreets taken against these disorders several times, but his absence and mine make less effect than otherwise would be; yet not so short of the neighbouring shires; and so soon as he came here he offered either to fine or to give a deputation to Claverhouse's brother to do it, but was desired to forbear till it was known what the Council would order as to regalities. And whatsoever may be done as to accumulative commissions to increase the office, yet the casualties being a proper private right seems not to be derogate. Though in some cases the Justice-General did cognosce, with conjunction of the bailie of regality, yet he never claimed the casualties, and if it be found otherways, your Lordships may consider what regalities may import while these Commissioners give . . . . severally, without the judges ordinary, and without consideration of the neglect. For our part, it was fit we should not retard any thing made for the king's service, and I doubt not that Claverhouse will bear witness that we did not hinder, but rather concur, though we are not ignorant of the point of right, nor would be a preparative to prejudge others, there being so many and so eminent persons interested in regalities. My lord, the supply hath been called for out of my lands for Martinmas last. My succession came not untill the first of November, ten days before that term. I will not plead right in it; yet it were of consequence to me, more than the value, that it were seen that authority is not unfavourable to me. Judges who are not deposed were to get their *quietus est* from their gracious Prince with kindness. He hath not an older judge in his dominions, and I doubt nothing of his favour. Whatever may be conjectured from his late distance upon my going without leave of his Royal Highness, yet there was some reason in it. I could not move my going without meeting the Test, and it was not my part to be amongst the first demurrers, seeing I resolved to retire and resign all public capacity, that my example need

not stumble any. *I never did nor do resolve to propagate my scruples against publie resolutions, though many times I have told them privately to those who might make no evil use of them, being in chief trust.* I hope your lordship will pardon this tediousness. I am resolved to say very little to any others, but my confidence is so much in your Lordship that I will even use all frankness with you, being determined unchangeably to continue, my lord, your Lordship's most affectionate and most humble servant, JA. DALRYMPLE."

In the beginning of August Claverhouse came to the parish of Old Luce, in which Carscreoch lies, and the conflict of jurisdiction between him and the Master of Stair we have seen, by the last letter of Stair's, to have been impending, soon broke out. On the 8th Stair writes to Queensberry :—

"MY LORD,—Claverhouse came to this parish Saturday last, and by some mistake went away without doing anything concerning disorders in this regality, but as to six or seven whom he carried prisoners to Stranraer. My son will give your Lordship an account of all that passed, and will take his directions from your Lordship entirely. I have the honour to be related to your Lordship, and I and mine are fully determined to serve you and your noble family; and I am fully confident of your favour, and that you will not believe harsh representations of us, but will, by your countenance, discourage any that would discourage the quiet retirement of, my Lord, your Lordship's most faithful, most affectionate, and most humble servant, JA. DALRYMPLE."

The Master of Stair had about this time given notice of his intention to hold a Regality Court, the object of which was to assert his right of jurisdiction and to protect the people by milder fines from the severe ones Claverhouse was imposing. He also forbade any one to attend the Court Claverhouse had

summoned, " which orders," the latter afterwards remarked in his report to the Privy Council, " the people so punctually observed, that when the complainer came to the place at the time appointed there appeared nobody but Sir John and his father, Lord Stair, who, after having endeavoured in vain to persuade the complainers of the legality of their proceedings, and understood from the complainers that he was resolved to force the people to obedience, and by the assistance of the troops to bring them to justice, offered to bribe the complainer and give him a sum of money not to meddle with that regality, which offers being rejected, they offered to themselves other projects for carrying on their designs." [1]

This offer[2] has been represented by the biographer of Dundee as a high crime on the part of the Dalrymples, but the attempt to buy off the district from the penal exactions of the Commission does not seem to deserve that character. The gentlemen of Fife had already done so by a bond, under which they engaged to suppress Conventicles, and something similar had been done in part of Lanark. It was in this light that it was viewed by Sir George Mackenzie, who writes, on 10th October to Lord Aberdeen, " Clavrose has brok a caball that was designing in Galloway to undertak for the peace of the country, as Clydesdale did. The country is most peaceable, and the shyre of Air is like to be as peaceable as Angus and keep the kirk as well."[3]

The conduct of Stair throughout these proceedings does not appear difficult to understand. He wished for quiet,—was anxious to keep in with the Government, no doubt in part with a view to maintain the rights and preserve the estates of himself and his son, and he used all the influence

[1] In Claverhouse's complaint to the Privy Council this appears to have been represented as "a bribe to connive at the irregularities of his mother the Lady Stair, his sisters, and others."—Fountainhall, *Decisions*, i. 201.

[2] Napier's *Memorials of Viscount Dundee*, ii. 89.

[3] Letter to Earl of Aberdeen, p. 107.

he could command with this object. But he also was plainly endeavouring in the country, as he had done at the Council Board in Edinburgh, to mitigate the severity of the penal laws.

At a Court held by the Master, on the 15th of August, fines were imposed, which Claverhouse, in his Complaint, calls "mock[1] fines, not extending to the fiftieth, sixtieth, or hundredth part of what by law they ought to have been fined in." Stair and his wife, who had withdrawn from the parish church, and were therefore specially obnoxious, concealed themselves, and were supposed to have left the country, but it appears that their actual flight did not take place till some weeks later.

In a letter, without date of place, probably because he did not deem it prudent to give one, Stair writes to Queensberry on 15th September :—

"My Lord,—It was my misfortune you were not at the last Council-day. I was so rudely treated by Claverhouse, having fined my factor and tenants in near a thousand pounds sterling, and there was said to be a citation against myself. I thought it time to cause an addition to be made to the Council for saving myself from this trouble, and for suspending the sentences against the tenants, that the Council might put them in the like condition of others of like guilt. The suspension was only granted on consignation, which was equal to denying it; and Claverhouse denied any warrant from him to cite me, and the Council recommended that he should not proceed on the citation which he said his brother might have given me amongst the other heritors of the parish. I found likewise that Claverhouse did press and was raising a libel to stage myself, my wife, and my eldest son, and I was dogged by Captain Patrick Graham, when there was a flagrant report of my being seized. Therefore I withdrew till I might know whether these

[1] Fountainhall, on the other hand, calls the fines of Claverhouse "most exorbitant."—*Decisions*, i. p. 191.

things would be owned and followed by those in authority. I had his Royal Highness's assurance by my Lord Hyde that I might securely live in any place in Scotland I pleased. I do resolve to represent to his Highness this usage. Nothing, for ought I could learn, was mentioned as the grounds of an accusation against me but that young Craighton had been harboured in my house a year ago, when it is commonly known that for a year and more before November last I was not in Galloway, nor did even know or hear of any such thing till it was expiscat by examining all neighbours concerning my family. It is true my wife withdrew from the minister[1] of our parish, which is no new thing, and I did believe not to be disquieted upon things not done or allowed by me, or which I cannot help. It is like great noise will be made of my consciousness to some strange guilt, but I thank God I am conscious of none, but have most loyally and affectionately served the king, and was hopeful to be protected in my age and indisposition, which hath continued near a year. My desire and hope is your Lordship will entertain no evil disposition of me, and will be instrumental that I may have security to live at home and end my days in peace. I knew that if I were staged that my wife withdrawing might be made use of against me, and therefore I would not appear till I knew whether these things would be prosecuted against, my Lord, your Lordship's affectionate and most humble servant, JA. DALRYMPLE."[2]

It must have been very soon after this, in the end of September or beginning of October, that Stair retired to Holland as "the place of the greatest common safety," having been advised

[1] Who this minister was I have not ascertained, but perhaps his character may be conjectured from that of his successor, Colin Dalgleish, who was appointed to the parish of Old Luce in 1684, and on 30th July 1686 received a pension of £50 from King James, soon after which he became a Papist.—Scott's *Fasti Ecclesiæ Scoticanæ*, Part ii. p. 766.

[2] Queensberry *Papers*, quoted in Napier's *Memorials of Dundee*, p. 293.

by Sir George Mackenzie that he could not guarantee him against prosecution if he remained in Scotland.[1] Mackenzie, on 10th October 1682, writes to Lord Aberdeen, Stair's successor as President: "and really when I consider all, we are happier in your principles and loyaltie, and that we are sure you wold dy and begge for the common Cavaliere cause, and in conscience so wold I. But however we must mak the best of every man and accident for the King our master, and the Duk our patron. I told the lat President that I wold not own him against our principles, whereupon Duk Hamilton told me he sent for Sir George Lockhart who has been very generous to him."

The generosity of Lockhart may perhaps have been his undertaking the defence of Sir John Dalrymple against the Complaint of Claverhouse before the Privy Council. That body, as might have been expected, condemned the Master of Stair, and acquitted Claverhouse, against whom he had brought a counter libel. The temper of the Council was shewn by its refusing to allow Dalrymple to lead evidence in his defence unless he raised this counter libel, and by the proposal of the Chancellor, from which, however, he afterwards departed, to examine Lockhart as a witness against his client. After Dalrymple had brought his libel, and proof had been led on both sides, the Council found the charge against Claverhouse of exacting free quarters, of unwarrantably seizing upon and fining the lieges,

[1] Law says "Stair went to Holland in October 1682" (*Memorials*, p. 236), but Sir William Paterson writes to Lord Aberdeen on 27th September, "and it is believed that my Lord Stair has retired to Holland." Sir George Mackenzie of Tarbert, Lord Clerk Register, writes to the same nobleman on 18th October:—"Shaftesbury is absconded; Lord Stair is in Holland; his son Hugh is on his return," and on 24th October, Alexander, Earl of Moray, writes to him from Whitehall:—"Yesterday I had a letter by the Holland packet from Sir James Dalrymple, which this morning I showed his Royal Highness, and he advysed I should send a copy of it to your Lordship. And now I send you the principal enclosed, which your Lordship may please to return with what you think fit to say upon it."

and of exacting sums of money without probation or sentence, "*not proven to infer any crime, fault, or misdemeanour, but, on the contrary, that he had done his duty,*" for which they ordered he should have the Council's thanks, a decision which reminds us of the saying of Charles when Lauderdale had been accused on similar charges, that he might have done many things against the country, but none against the King.[1] Dalrymple, on the other hand, was found guilty of employing persons to be his clerk, and bailie of regality, who had been formerly convened before Claverhouse of imposing inadequate fines, of prohibiting persons within the regality from attending Claverhouse's Court, of causing a servant of his to make a seditious complaint against the soldiers for exaction and oppression, and of misrepresenting Claverhouse to the Privy Council. For these offences he was deprived of his office of Bailie of the Regality, and fined £50 sterling. "There was," says Fountainhall, who acted with Sir George Lockhart as counsel for Dalrymple, "much transport, flame, and fury in this cause, and the cloud on the late President's family was taken advantage of now, which shows the world's instability."[2]

In Holland Stair chose Leyden for his residence, attracted no doubt by the fame of its university and the advantages the society of its learned men and library afforded for study. Even at the present day the passing traveller is struck with the fitness of this venerable town, with its unpretending yet convenient houses, its quiet streets intersected with still canals, and its peaceful surrounding landscape, for the student's life. The University of Lipsius, Scaliger, and Salmasius, of Heinsius,

[1] Contrast with this the language of King William on accepting the Crown of Scotland: "We shall never believe that the true interest of the people and the Crown can be opposite, and shall always account that our greatest prerogative to enact such laws as may promote truth, peace, and wealth in our kingdoms."

[2] Fountainhall, *Decisions*, i. 191, 201, 217-270, and 303; see also Wodrow, iii. 438.

and the Douzas, of Arminius and Grotius, it has been called with excusable exaggeration the most sacred spot in Europe for the scholar.[1] Great must have been the contrast between such a scene and what was then passing at the Council Board and Parliament House in Edinburgh, or in the country districts of the west, where the troopers of Claverhouse hunted the conventiclers, and their preachers denounced the perjured King and his godless ministers with the anathemas of the Hebrew prophets. Yet the peace of Leyden had been bought with blood. At the close of the second siege, the university had been founded by William the Silent in 1575 "to gratify," as the charter expresses it, "the city and its burghers on account of the heavy burdens sustained by them during the war with such faithfulness."[2] A prudent management had drawn to it as professors many eminent men, not of Holland merely, but from other parts of Europe.[3] Amongst its ornaments when Stair went there were the learned ecclesiastical historian the Genevese Spanheim,[4] who had been called from Heidelberg in 1670, Gronovius of Hamburgh, the author of "Collections of Greek Antiquities" and annotator of Grotius, of whom it was said by Burnet,[5] he was such a master of ancient learning it seemed as if he had all the authors lying open before him, and the divines, Trigland[6] and Lemoyne.

[1] "Hanc urbem," wrote Grævius, at this time a Professor at Utrecht, "præ cæteris nobilitavit et super omnes extulit illustrissimum et augustissimum illud sapientiæ et omnis doctrinæ sacrarium maximum orbis museum in quo plures viri summi qui principatum ingenii et eruditionis tenuerunt floruere quam in ceteris omnibus Europæ Academiis."

[2] Charter of Leyden, quoted by Motley, *Dutch Republic*, p. 581.

[3] See on this point Sir William Hamilton's account of the way in which the patronage of Leyden was exercised when James Douza was one of its Curators, and Scaliger and Salmasius were elected to its Chairs.—*Discussions*, p. 363.

[4] Calamy's *Life*, 173.

[5] Burnet's Letters.

[6] Author of *Varia Sacra seu Sylloge variorum Opusculorum Græcorum ad rem ecclesiasticam spectantium.*

The civil law was represented by Noodt,[1] called the Dutch Cujacius, Schulting,[2] and the younger Voet.[3] At the sister school of Utrecht,[4] which kept up a constant intercourse with Leyden, enlivened by the controversies of the professors, De Vries lectured on politics, Grævius on history, Van der Meuden on civil law, and Witsius on theology. The contests[5] between the old philosophy of Aristotle and the new which Descartes had founded, and between the theology of the Cocceians and the Voetians, which had succeeded the fiercer struggles of the Arminians and Gomarists, still continued. Nor was the rest of Holland without its celebrated men. At Amsterdam Spinoza had shortly before ended what even the abhorrers of his philosophy admit to have been a blameless life. In the same city Bayle was just commencing that singular literary career from which modern criticism dates its origin; his "Nouvelles de la République des Lettres" was first published in 1684. A crowd of English and Scotch exiles were then learning from the citizens and statesmen of the Republic, of whom Fagel was the most illustrious, those principles of toleration which, when transplanted to Britain, were to bear such noble fruit. In 1686 Locke wrote from Utrecht his famous "Letters on Toleration."

[1] Gerardt Noodt, born 1647, died 1725.

[2] Antony Schulting, born 1659, died 1734.

[3] John Voet, born 1647, died 1714.

[4] Calamy's *Life*, 157.

[5] "The main differences then in the university," writes Calamy, who studied about this date at Utrecht, "were about the old philosophy and the new, and between the Cocceians and Voetians."—*Life*, p. 157. Cocceius had died at Leyden in 1669, Voetius at Utrecht in 1672. These two controversies were intimately connected, the Cocceians in theology being in general Cartesians in philosophy.—See Mosheim, *Church History*, ii. 257. The Voetians were the followers of Gisbert Voet, Professor of Divinity at Utrecht. Cocceius was a native of Bremen, and Professor at Leyden. His leading principle of biblical interpretation was, "that the words and phrases of Scripture are to be understood in every sense of which they are susceptible, or, in other words, that they signify in effect everything that they can possibly signify" (Mosheim, ii. p. 258)—a principle unconsciously accepted by many who would shrink from stating it explicitly.

Even art, for which the Low Countries might seem an unfavourable soil, flourished in the atmosphere of liberty. The memory of Rubens, Van Dyck, and Rembrandt was still fresh, and, though the schools which followed theirs aimed at a lower mark, the human and the natural rather than the divine—the living present, however trivial, rather than the forgotten past, however noble—the aspect of the land and sea, the manners and the life of Holland towards the close of this century were fortunately being preserved for after times in the pictures of Ruysdael, Backhuysen, and Vandervelde, of Van Ostade, Gerard Douw, and the younger Teniers. "An universal industry," says Burnet, "was spread through the whole country." Such was the many-sided activity of the people amongst whom for the next six years the life of Stair was cast.

Of Stair and his Scotch companions in exile, the son of one of them, Stewart of Coltness, himself born this year at Utrecht, gives the following picturesque account. After describing the flight of his mother, who, like Stair's wife, had been forced to follow her husband to Holland, Stewart writes: "Her husband, with Mr. Pringle of Torwoodlee, came half-way on to Leyden, and met these recent fugitives and conducted them to Utrecht, where trouble was in part forgot and sorrow in some measure fled upon the first transports of being safe and together. Here was the ingenuous upright Archibald Earl of Argyle, too virtuous for so licentious a Court as that of King Charles. Here was the Earl of Loudon, who died anno 1684, and lies buried in the English Church at Leyden. There was here the Lord Viscount Stair, and with him for education his son, Sir David Dalrymple, in better times Lord Advocate, and his grandson John, that great general under Queen Anne, and the ambassador of elegant figure in France and a field-marshal under King George. Here also was Lord Melville, High Commissioner to the Restitution Parliament under King William and Secretary of State, and with him his son, the

Earl of Leven, who went to the King of Prussia's service, and after this was Commander-in-chief in Scotland and Governor of Edinburgh Castle in Queen Anne's reign. But it were endless to name all the honest party of gentry and ministers outlawed, banished, and forfaulted for the cause of religious and civil liberty.

"I shall add here was the good and great Mr. William Carstaires, high favourite of King William and of his Cabinet Councell for Scots affairs; the Jacobites and disaffected Lords for this called him the Cardinale. He surely was one of the greatest clergymen ever embellished any Church, often Moderator of Assemblies, full of piety and Christian charity."[1]

Stair did not spend the years of his exile in idleness or unavailing regrets. Even in absence he still served his country, and worked for the improvement of her law. The year after he came to Leyden he published at Edinburgh the first volume of his Decisions of the Court of Session, extending from 1661 to 1671, to which he prefixed the Acts of Sederunt from 5th June 1661 to February 1681. The Epistle in which he dedicates this work to his former colleagues on the Bench was dated at Leyden on 9th November 1683.

Many similar collections then existed in manuscripts, which were multiplied by copies made by young lawyers, and much consulted, but this was the first series[2] of Reports which

[1] Coltness Collection, Maitland Club. Amongst the exiles not mentioned by Stewart were Sir Patrick Hume of Polwarth, the friend of Pope, Swift, and Arbuthnot, and Fletcher of Saltoun, afterwards the leader of the Patriot party who opposed the Union, Bishop Burnet, James Stewart the Lord Advocate under Queen Anne, and Alexander Cunningham, editor of Horace and author of *A Latin History of Great Britain.*

[2] In 1681 Fountainhall notices that "George Gibson, brother to the Laird of Durie, obtains a warrant from the Privy Council for printing the decisions observed by his grandfather, commonly called Durie's Practiques, with the alphabetical compend thereof, and prohibiting all others for such a term of years to do it, so he expects the printers will offer him money for it."—*Decisions*, i. 158. This expectation, if ever realized, was not realized till 1690, when Durie's *Decisions* were first published.

had been printed in Scotland, and its publication therefore marks an important point in the history of the law. In the dedicatory epistle he remarks: "I had the best opportunity to make these observations, being scarce a day absent in any of these Sessions from the first of June 1661 to the first of August 1681, and I was not one day absent from the 23d of January 1671, when it pleased his Majesty to appoint me to be constant President of the Session in place of my Lord Craigmillar, who then demitted, except the Summer Session of 1679, when I was absent by his command."

This preface contains an interesting notice of the early history of Scotch law-reporting. James V. had, at the Institution of the College of Justice, ordered a Journal of Decisions to be kept, which was done by John Sinclair,[1] Dean of Restalrig, for ten years. Sinclair, who became Bishop of Brechin, was the third President of the Court, and the earliest reformer, or, more correctly, organizer of its procedure. To his residence in France may be attributed with much likelihood some of the points in which that procedure resembled the Parliament of Paris, which had indeed been the model of its founders, the Regent Albany, James V., and Gavin Dunbar, Archbishop of Glasgow. The custom of keeping records[2] of the decisions by the judges themselves was followed by Maitland of Lethington,

[1] Stair mentions Henry Sinclair, the elder brother of John, who was Bishop of Ross, and the second President of the Court, as the compiler of the Practics, but I incline to the opinion of Mr. Tytler, that John was the compiler, both because Henry was not Dean of Restalrig, and because the Decisions commence in 1540, the year of John's admission as an ordinary Lord.

[2] Sinclair's Decisions extend from June 1540 to 17th May 1550, see MS. Advocates' Library, A. 3. 3.; Maitland's from 15th December 1550 to 16th March 1569; and Lord Culross's from 24th March 1570 to 15th April 1589. They are to be found in a MS. volume, Advocates' Library, A. 3. 3. Haddington's Decisions extend from 1609 to 1624; Hope's from 1610 to 1632; Durie's from 1621 to 1642; Spottiswoode's from 1632 to 1636. Besides these named by Stair, there are collections extant by Nicolson, 1610-32, and of the decisions of the English Judges from 1655-61.

the elder, Colville Abbot of Culross, Hamilton of Glencairn afterwards Earl of Haddington and Lord President, Sir Thomas Hope Lord Advocate, Sir James Balfour of Pittendreich Lord President, Sir Robert Spottiswoode of New Abbey Lord President, Sir Alexander Gibson the first of Durie, and several other judges.[1]

After the nomination by Charles II. at his restoration the judges of the Court of Session were almost entirely new, which rendered it the more necessary that a record of its decisions should be kept. This induced Stair to undertake the task which received the sanction of his colleagues. His method of preparing it he describes in a curious passage, which bears witness to his untiring industry, a quality often found in conjunction with moderate talents, sometimes wanting in great men, but seldom in the greatest. "I did form," he says, "this breviat of their decisions in fresh and recent memory de die in diem as they were pronounced. *I seldom eat before I observed the Interlocutors I judged of difficulty that past that day, and when I was hindered by any extraordinary occasion, I delayed no longer than that was over.* It was neither feazable nor fit that I should set down the large pleadings or the written informations of parties. I did peruse them thoroughly, and pitched upon the reasons which were of moment as to the points determined, whereas in the same informations there were many obvious clear points insisted in which I omitted."

His statement of the value of decisions was doubtless partly due to the charges of partiality then made against the Court. "It is," he says, "to shew that like cases have like events, and that there is no respect of persons in judgment."

[1] The practice of publishing reports of decisions was continued by the Judges of the 18th century, Sir Hugh Dalrymple, Forbes of Culloden, Lord Kames, Elchies, Kilkerran, Monboddo, and Hailes, and by one of the 19th, Baron Hume. Since Hume, whose decisions were published after his death, no judge has been a reporter, though several have reported before becoming judges.

The same charges led him to assert the startling and dangerous paradox, "that it is more the advantage of a nation that their judges were but reputed just, though they were not, than that they were just, yet were reputed unjust, for this case toucheth and grieveth all, whereas the former can reach but a few."

This paradox, however, contains a truth apt to be overlooked, that the bad or low reputation of its Courts of Justice is a serious injury to a nation apart altogether from the direct consequences of their judgments.

The style of Stair's reports is concise and clear. The gist of the argument is first stated, and then the interlocutor or judgment of the Court—the opinions of the judges are not given. It may be doubted whether this manner of reporting is not in some respects preferable to that now in use. The law does not gain in precision, and much time [1] is lost by the verbatim narrative of the views of judges of various degrees of ability or knowledge of the particular department of law under consideration, in which there is frequent repetition, and sometimes material variation in the grounds of judgment; and the bulk of the reports is inordinately increased. But such a mode of reporting necessarily requires a greater knowledge of law in the reporter and more care in the preparation of the reports.

[1] The time lost by this practice is, (1) that of the judges in preparing and pronouncing judgments which are mere repetitions; (2) that of the other judges, counsel, and agents, who have to listen to their delivery; (3) that of the reporters, who report them, or come to the conclusion that they are not reportable; (4) that of all persons, whether judges, counsel, agents, or litigants, who have to study those repeater judgments in order to find whether there is variation in them or not.

CHAPTER X.

1686-1688.

Stair publishes at Leyden the *Physiologia Nova Experimentalis*—Position of the second half of the 17th century in the history of Physical Science—The *Physiologia* dedicated to the Royal Society of London—Stair describes its aim and his new Corpuscular hypothesis in the Preface—The *Physiologia* part of a more general treatise intended to embrace the whole of Philosophy, which was to consist of four Inquiries concerning Human Knowledge, Natural Theology, Morality, and Physiology—Analysis of the *Physiologia*—Its Definitions and Axioms—His corpuscular hypothesis contrasted with the theories of the Atomists and Descartes—His theory of motion—His erroneous astronomical notions—Undulatory theory of light—His sketch of imperfect chemistry of the time—The *Physiologia* favourably reviewed by Bayle—The States-General refuse to expel Stair from Holland—Stair charged with treason for complicity in Rye House Plot and Argyle's expedition—Account of the proceedings against him by Sir George Mackenzie, the Lord Advocate—Evidence against him obtained by torture, and inconclusive proceedings against him adjourned—In 1687 Sir John Dalrymple, Master of Stair, becomes Lord Advocate, and obtains a remission for his father—Stair refuses to accept the pardon, and continues in Holland till the Revolution of 1688.

In 1686 Stair appeared as an author in a new field by the publication at Leyden of his *Physiologia Nova Experimentalis;* but from the expression on the title-page that it had been lately translated into Latin (Nuper Latinitate donata) and the mention in the preface addressed to the Royal Society of London, that he had received the king's diploma for its publication in 1681, we may conclude that it had, like his other works, lain by him in manuscript for some time. It would seem, indeed, that it was published in the end of 1685, though it bears 1686 on the title-

page;[1] for it was reviewed by Bayle in the *Nouvelles de la République des Lettres* for December 1685. That it had been projected, if not written, in 1681 is proved by Stair's contract[2] with the printer, where one of the four Inquiries he then designed publishing is stated to have been concerning Physiologie.

The second half of the seventeenth century, like that of the nineteenth century, will be always remembered in the history of physical science. The work of observation and experiment, on the necessity of which Bacon had insisted, and which Descartes had aided by his critique of knowledge and doctrine of method, more than he had injured it by his

[1] As the work is rare, and the title-page gives a short summary of its contents, I transcribe it:

Physiologia
Nova
Experimentalis
In Qua
Generales Notiones Aristotelis Epicuri & Cartesii supplentur
errores deteguntur & emendantur
Atque
Claræ distinctæ & Speciales Causæ præcipuorum experimentorum aliorumque phenomenωn
naturalium aperiuntur
Ex
Evidentibus principiis quæ nemo antehac perspexit & prosecutus est
Authore D. De Stair, Carolo ii. Brittaniarum
Regi a Consiliis Juris & Status
Nuper Latinitate donata

Meditabor de omnibus operibus tuis, Ps. 77 : 12.

* * * *
* * *
* *

Lugduni Batavorum.

Apud Cornelium Boutesteyn
CIↃ IↃ C LXXXVI.

[2] Dallas's *Stiles*, Part ii. p. 172. 1697. See this Contract in Appendix, Ch. viii.

erroneous physical speculations, had been for a time retarded by political and religious strife. It now advanced with gigantic strides.

"No kingdom of nature," writes Macaulay, "was left unexplored; to that period belonged the chemical discoveries of Boyle,[1] and the earliest botanical researches of Sloane. It was then that Ray[2] made a new classification of fishes, and that the attention of Woodward[3] was first drawn towards fossils and shells. . . . But it was in these noblest and most arduous departments of knowledge in which induction and mathematical demonstration co-operate for the discovery of truth, that the English genius won in that age the most memorable triumphs. John Wallis[4] placed the whole system of statics on a new foundation.

[1] "Boyle's experiments were made about 1650, and the result at which he arrived was, that when the air is thus compressed (*i.e.* by columns of mercury in tubes), the density is as the pressure. . . . The same law was soon afterwards (in 1676) proved experimentally by Mariotte. And the law of the air's elasticity, that the density is as the pressure, is sometimes called the Boylean Law, and sometimes the Law of Boyle and Mariotte."—Whewell, *History of the Inductive Sciences*, ii. 408, 3d Ed., 1857.

[2] "In Ichthyology, Ray with his pupil and friend, Willoughby, appears as the first founder of a tenable system. In 1668 he published, with additions, at the expense of the Royal Society, Willoughby's work *De Historia Piscium.*"—Whewell, iii. 30. Ray, who was fellow of Trinity College, Cambridge, along with Newton, was also one of the first systematisers of Botany.—Whewell, iii. 251.

[3] Woodward published his Essay towards a Natural History of the Earth in 1695.

[4] "The laws of the mutual impact of bodies were erroneously given by Descartes in his *Principia*, and appear to have been first correctly stated by Wren, Wallis and Huyghens, who, about the same time (1669), sent papers to the Royal Society of London on the subject. In these solutions we perceive that men were gradually coming to apprehend the third law of motion in its most general sense; namely, that the momentum (which is proportional to the mass of the body and its velocity jointly) may be taken for the measure of the effect; so that this momentum is as much diminished in the striking body by the resistance it experiences, as it is increased in the body struck by its impact."—Whewell, ii. 46.

"Edmond Halley[1] investigated the properties of the atmosphere, the ebb and flow of the seas, the laws of magnetism, and the course of the comet. Nor did he shrink from toil, peril, and risk in the cause of science. While he, on the rock of St. Helena, mapped the constellations of the southern hemisphere, our national observatory was rising at Greenwich, and John Flamsteed, the first astronomer-royal, was commencing that long series of observations which is never mentioned without respect and gratitude in any part of the globe. But the glory of these men, eminent as they were, is cast into the shade by the transcendent lustre of one immortal name."[2]

In the year in which Stair published his *Physiologia*, the manuscript of the *Principia* of Newton, the bearer of this immortal name, was presented to the Royal Society of London.[3] It is not wonderful that the treatise of the Scotch lawyer has shared the general eclipse. It is interesting, however, to see how actively his mind was engaged on the problems which Newton's genius solved.

The preface of Stair's work, addressed to the same Society, which had been founded in 1662, at the instance of a Scotchman, Sir Robert Murray, a friend of Lauderdale and Stair, whose colleague he had been as Justice-Clerk, holding

[1] "A paper of Halley's, in the Philosophical Transactions for January 1686, professedly inserted as a preparation for Newton's work, contains some arguments against the Cartesian hypothesis of gravity."—Whewell, ii. 115. "Halley has the glory of having first detected a periodic comet in the case of that which has since borne his name."—Whewell, ii. 182. This was in 1705. His expedition to St. Helena in 1677 was at his own expense, to observe the southern stars. In 1698 he was appointed by William III. to the command of a small vessel, to make magnetical observations.—Whewell, ii. 220.

[2] *History of England*, i. 408.

[3] "At the ordinary meeting on 29th April 1686, Dr. Vincent presented the Society with the MS. of the first book of Newton's immortal work entitled *Philosophiæ Naturalis Principia Mathematica*, which the illustrious author dedicated to the Society. It was not, however, published till 1687." —Weld, *History of the Royal Society*, i. 307.

that office from 1667 till his death in 1673,[1] contains a clear statement of its object. He declares in it that he has adapted the style to the matter, and avoided rhetorical blandishments, which injure accurate disquisitions by which the judgment is to be inclined, and not the affections; "fructus enim," he adds, in Baconian phrase, "quaerimus non flores." Accordingly, the work possesses the true eloquence of directness and aptness to the matter in hand. Stair commends the Society for having resumed and promoted the study of nature, which had been almost despaired of—for the most pleasant exercise, and the fittest for the mind of man, is the contemplation of nature, in which the Divine wisdom, power, and goodness, are most clearly reflected. If so much admirable enjoyment, he observes, is afforded by the sight of phenomena and effects, how much more will result from the contemplation of the wonderful chain of causes! The investigation of these has been carried on with so much success, that in a few years more of solid natural science has been brought to light than in many centuries before. "Me etiam," he continues, in a passage which the original Latin expresses with more dignity than a translation, "ardens et assiduum desiderium in naturæ scrutinium allexit nec quicquam antiquius habui quam ut vobis in generoso vestro proposito inservirem quos vidi rectissimum tramitem ingressos phænomena abdita naturæ omni industria primum prosequentes ut inde principia deducantur quæ phenomenis omnibus quadrent et a nullo contrarientur prudentes conditores imitati qui totam materiam congerunt priusquam fundamenta jaciunt."

Principles, he continues, once asserted are not easily retracted. Hence the tenacity with which the Peripatetic hypothesis has been defended, notwithstanding of the efforts of Descartes, Gassendi, and others whose own systems, however, have the same

[1] Wodrow, i. 275. "He was the truest and worthiest man of that age, and was as another father to me."—Burnet, *History of His own Times*, i. 355.

defects, for the doctrine of both schools is general and indistinct, does not exhibit special causes or the modes of causation, and consequently does not agree with the hidden phenomena of nature when afterwards discovered. Gassendi has attributed all the phenomena of nature to the atoms of Epicurus, but both the powers of these atoms, and the substantial forms of Aristotle, are too general, and do not explain the special effects in nature.

Descartes seems to be more special in his hypothesis of three elements, but that ingenious man denied all power and efficacy to matter, and attributed all the effects of nature to God alone. Hence his physiology is reduced to the single proposition that all things are because God so willed, " Quod lippis et tonsoribus notum est." His labour is in vain, therefore, in supposing so many changes of matter by means of vortices and elements, for if God alone causes all things, why should he do so in a circuitous manner.[1] As the more liberal learned admit that Aristotle may, in this department, be deserted, or rather that his work may be perfected, so it is to be hoped they will give up the Cartesian system, if principles more clear, special, and consonant to the phenomena of nature are affirmed. No blame is to be imputed to philosophers for missing discoveries which, once made, are obvious. It rather may be deemed a provision of Divine Providence for the solace of man that each age may have new inventions. The accidental nature of inventions and discoveries should lead us to ascribe the glory of these to God mainly. In support of this he refers to several of the notable discoveries and inventions of the age, which had been fortuitous—Harvey's[2] theory of the circulation of the blood, Torricelli's experiments as to the sus-

[1] "Nam si solus Deus efficiat, quorsum per ambages ?"

[2] As to Harvey's discovery, see Whewell, *History of the Inductive Sciences*, iii. 330. His " Exercitatio anatomica de motu cordis et sanguinis" was published in 1628. Besides the practical results of Torricelli's experiment,

pension of mercury in a tube (from which the barometer resulted), Swart's invention of gunpowder, and the invention of the telescope (*specula magnificantia*).

His own attempt Stair describes with humility, as being merely to follow out some traces of reasoning to their legitimate conclusions: "mihi in magnis voluisse sat est." He thanks the Society for their public spirit in freeing philosophy from pedantry, the influence of authority and the restraints which theology had imposed on it. The absence of experiments had hindered hitherto the progress of natural science. Aristotle and the ancients had made none, Descartes and Gassendi few. He asks pardon for having himself proposed a new corpuscular hypothesis; this he has done not from ambition or vanity, but because it is the duty of man first to please God, and next to benefit the human race.

In order to appreciate the *Physiologia*, we must have regard to the time when it was written. Natural philosophy was not then, as now, divorced from mental philosophy and metaphysics, nor were its own boundaries clearly determined. The great intellects of the age aspired to trace the scheme of the universe, to contemplate God, man, and nature in their essence and relations to each other. They were philosophers as well as men of science. So this work of Stair was but a part of a more comprehensive and ambitious scheme—a complete system of philosophy. His treatise was to have contained four inquiries concerning human knowledge, natural theology, morality, and physiology.[1] But the first three were never printed, nor is it certain that they were ever written, although the Treatise on the Divine Perfections, afterwards published anonymously in 1695, may be a part of the Treatise on natural theology.

it was of scientific importance in establishing the theory of the equilibrium of fluids.—Whewell, ii. 51.

[1] Dallas's *Stiles*, p. 152. Stair's contract with Anderson the printer.

The *Physiologia* is divided into a series of chapters, styled Explorations, to indicate their tentative character. He regards it not as the chief science, but as subordinate to natural theology, metaphysics, and even to moral philosophy.[1]

The first Exploration lays down certain definitions and common principles similar to the axioms of geometry, to be assumed, not proved. Nature is defined as matter both animate and inanimate, physiology as the knowledge of the phenomena of nature; phenomena are all things which are perceived by the senses in bodies; science is the knowledge of these phenomena by their proper causes specially and distinctly understood.

The axioms or postulates are the following:—

1. Nothing is admissible as existing in nature which is inconsistent with the infinite perfection of God.

2. The objects or phenomena which we perceive are proved by the concurrent testimony of sense and reason to be real, and not merely phantasms.

3. It is not inconsistent with the divine perfections that God should have communicated to His creatures a real activity and power of causation.

4. Where diverse modes of causing phenomena are possible, that mode is to be preferred which is most consistent with divine wisdom.

5. God does nothing in vain, and therefore does not multiply unnecessary substances (*entia*).

6. There is no inconsistency in supposing that God could create an indivisible substance.

7. That which is without perception is incapable of intrinsic power operating differently in different circumstances; but if it has any intrinsic power, such power must operate necessarily and with uniformity.

[1] Physiologia non est prima scientia sed subalterna naturali theologiae metaphysicisque disciplinis quæ principia per se evidentia continent imo etiam philosophiae morali quatenus ostendit quousque in veritate nostrarum cogitationum acquiescere tenemur unde moralis certitudo oritur.—P. 11

8. That which is without perception and the power of self-determination cannot move or operate with reference to any place, point, body, or end.

9. Nothing can operate except where it is, or where there is an instrument of motion in connexion with it.

10. A conatus and pressure to move may exist and continue although the actual motion is impeded.

11. The same part of matter cannot be moved or move at the same time in opposite directions.

12. Whatever is not involved in the essence of a thing may exist apart from it. The perception of material objects by a bodily organ and perception without a bodily organ are distinct things, which do not involve each other; and so the perception of spiritual and immaterial objects is distinct from either of the former kinds of perception. The several senses and instincts are also distinct from each other, and from the faculty of reason and will; so there is no incongruity in the existence of animals which perceive by the bodily organs only—men who perceive with these, and have reason and will besides, and spirits who perceive both material and spiritual objects without bodily organs.

He concludes this section of his work with a criticism of the Atomic and Cartesian physiology, and an explanation of the middle position his own occupies.

The Atomists hold that matter consists of inflexible atoms; the Cartesians that there is nothing fixed in the universe except their three elements.[1] His own view is, that God, by creation, gave union and form (figure) to certain parts of matter, and has formed these into corpuscles, whose union no material power can separate—the form of some of these is fixed, of others

[1] The three elements of matter, according to Descartes, were (1.) minute spherical particles; (2.) the filings rubbed off these by their motion; and (3.) denser particles less fitted for motion, or, as Stair names them, *Globuli*, *Ramenta*, and *Crassiora Corpuscula*; see Descartes' *Principia*, p. 62, ed. Hart, Londini, 1644; and Whewell, ii. 104.

flexible; but the greater part of matter has neither union nor form. The Atomists teach that all atoms and the whole mass of nature is imbued with the most diverse powers of motion; the Cartesians deny all intrinsic power in nature. His own view is, that God conferred a power to retain union and promote motion upon certain parts of matter. The power given to some of these parts is merely passive; but in others (the animate creation) it is active. The Atomists assert that a vacuum is necessary; the Cartesians deny its possibility. His own view is, that it is neither necessary nor impossible, but that God, of His good pleasure, might have created the world either with or without a vacuum. The new Atomic school, he observes, differs from that of Epicurus in recognising that the atoms were created by God, and were not eternal and uncreated. The Cartesians, by the denial of a vacuum simpliciter, in effect deny creation, and assert the eternity and indestructibility of matter. Yet he would not brand the acute thinker, who awakened the world from the dreams of the Peripatetic philosophy, with Atheism. Descartes, indeed, allowed that God could do everything possible, but he erred in his view of what was possible; and if he denied much to the Creator, he denied more to creatures, as he placed the sole power of motion in God, by whose will such and such thoughts were followed by such and such motions; whence Malebranche had asserted that no conception or thought could arise either from extrinsic or intrinsic objects, but only from God, these objects being present; while other Cartesians converted the proposition of Descartes, and said certain thoughts were produced by certain motions.

He closes this chapter by praising the Chemists as the first experimental philosophers, but notes that their science is a partial and subordinate contemplation of the effects of certain bodies acting on each other, like statics, hydrostatics, and mechanics; whereas physiology embraces the whole phenomena of nature. Physiologists have hitherto been content with experiments, and

have not proposed hypotheses, with the exception of Van Helmont, who had revived the theory of Thales, that water was the first principle of all things; and Van der Beckt, a physician of Hamburgh, who developed that theory by supposing a substance called Alcahest, by which air could be changed into water; but of this substance he made a great mystery, alleging it was known only to himself.

In the second chapter Stair treats of matter, and further explains his corpuscular theory.

The third chapter is devoted to the subject of motion and rest. While exposing the insufficiency and want of distinctness in the Aristotelian and Cartesian definitions of motion, he declines himself to define it, and prefers to give an examination of its different kinds. In this examination, he follows the still common Aristotelian division of natural and violent motion, but corrects this division by pointing out that although there is (which the Cartesians denied) natural motion, the true distinction lies between voluntary motion caused by the self-determination of the individual moving, and violent motion which proceeds from an extrinsic cause. He discusses at considerable length the problem then much agitated,—why a body once set in motion continues to move when the cause of its motion ceases directly to act upon it. This problem he resolves by an hypothesis of the action of the air as an unequal and elastic medium, to which he frequently recurs throughout his work; so that a body once set in motion will continue to move by means of that medium, and in the direction of its least resistance.[1] He appears in this hypothesis to attribute

[1] Newton's enunciation of the law is, "Corpus omne perseverari in statu suo quiescendi vel movendi in directum, nisi quatenus a viribus impressis cogitur statum illum mutare."—*Principia.* It had been discovered by Galileo, who, in his Dialogues on Mechanics, 1638, thus states it :—"Mobile super planum horizontale projectum mente concipio omni secluso impedimento; jam constat ex his quæ fusim alibi docta sunt, illius motum equabilem et perpetuum super ipso plano futurum esse, si planum in infinitum extendatur."—Whewell, ii. 20.

erroneously an active effect to the air, as producing or continuing motion, instead of, as is truly the case, retarding it, and to have arrived less near the first law of motion than the Cartesians, whose almost exact statement of that law he rejects, viz., that a body once in motion will always proceed in the same manner, that is, in the same line of direction, and with the same velocity and force, until acted upon by some external cause.

His fourth chapter contains an elaborate essay on astronomy, in which, although much knowledge is shown of the writings of Ptolemy, Copernicus, Tycho Brahe, and Descartes, he must be ranked with those who rejected the theory of the sun as the centre of the planetary system. In the fourth of the seventeen propositions in which he explains his own hypothesis, he says, "Supponimus cyclum solis ita locatum esse in sphaera planetarum ut sol annuum suum motum circa terram spatio 365 dierum et fere quadratu diei absolvat." His view is therefore valueless for the advance of astronomical science.

In the fifth chapter, on gravity, he equally misses the true explanation of the phenomena afforded by attraction, and falls back on his hypothesis of the elasticity of the air. The remaining chapters treat of special subjects in which the knowledge of that age has been still further distanced by the discoveries of modern times. In the sixth he discusses the phenomena of fire; in the seventh of light, with regard to which he seems to have arrived at an indistinct notion of the undulatory theory, which had, however, been previously clearly stated by Hooke;[1] in the eighth of heat and cold; in the ninth of

[1] Procedemus ergo ad tertiam opinionem quod nempe lumen non sit per substantialia effluvia a lucido emissa sed per motus radiorum aetheris quo radii illi vibrantur a motu corporis lucidi: opinionem hanc primo explorabimus dein cum opposita comparabimus. . . . Ita produci et propagari lumen tenemus tam a sole quam ab aliis corporibus lucentibus ubi nulla difficultas nec in mole effluviorum nec in celeritate nec in spatio in quo effluunt et refluunt nam radiorum itus et reditus simul et semel perficitur et lumen vere in instanti per totam sphaeram lucis propagatur quorsum ergo commiscendum aliud corpus a lucido profluens ab aethere diversum tot difficultatibus onustum.—P. 344.

water, which is followed by two chapters on the sea and tides, and on springs and rivers. He then passes to what may be called the elements of the imperfect chemistry of his time, treating of oil, salt, fermentation, and the corrosion and solution of metals, but his knowledge of these subjects seems to have been slight.

The six concluding chapters are devoid of that elegance of arrangement which generally characterizes the works of Stair, and are rather separate and somewhat crude essays on topics which belonged to the subject-matter of his Treatise, but had not found a place in the body of it. They are on crystallization and congelation; on specific spirits, an obscure phrase, by which he appears to have understood the corpuscles of which fluids (other than water) were composed according to his hypothesis; on terrestrial corpuscles; on the air and atmosphere; on the vacuum; and on the common qualities of matter.

The *Physiologia* attracted some attention on its first appearance, and received a favourable notice in the review of Bayle.[1] It shows throughout independent thought and close observation, but fairly judged it is the work rather of an eclectic amateur of science than of a scientific genius. Although an inductive and experimental philosopher, he is hampered by the *a priori* theories contained in his axioms, few of which would be admitted by the modern man of science. It has been thought well, however, to give this slight sketch of its contents in order to exhibit an aspect of the mind of Stair which is little known. Probably his attempt was due to the early training of the student and regent at Glasgow, where, as in Scotch universities at the present day, a tincture of science was conjoined with the discipline in arts. This study of natural science was not without effect upon his legal work. For the lawyer, however imperfect may be his scientific knowledge, should cultivate the virtues of accuracy, candour, and clear-

[1] See *Nouvelles de la République des Lettres*, December 1685.

ness, in which the habit of scientific inquiry is one of the best trainings.

Stair was not allowed to devote himself in Holland to the study of philosophy and law undisturbed by the political troubles of his country. His wife, we have seen, had been so harassed that she was forced to follow him to Leyden; his son, the Master of Stair, had been fined and deprived of his office of bailie of the regality of Glenluce in 1683. In the following year he was seized, without citation, when at his house of Newliston,[1] near Edinburgh, and committed to the Tolbooth, where he remained three months, and was only liberated on giving a bond for £5000, Lords Lauderdale and Crichton being his cautioners.

Application was made to the States of Holland to expel Stair himself from their dominions, but they refused to comply. Spies[2] were then sent over to seize him, but he eluded them, shifting his residence from one town to another, and apparently visiting Utrecht, but Leyden still remained his head-quarters.

On 3d December 1684, the Lord Advocate, Sir George Mackenzie, was ordered by the Privy Council to raise a process of forfaulture for treason before the Duke of York and Parliament against Stair, Lord Melville, Sir John Cochrane of Ochiltree, and several other persons.[3] In March of the following year, Stair, and those associated in the same charges, which

[1] Fountainhall, *Historical Notices*, 558. *Decisions*, i. 303.—"Sir John Dalrymple's whole papers were seized on and himself committed close prisoner to the Tolbooth of Edinburgh, and his two brothers, Mr. James and Mr. Hew, are put under bayll to answer when called. The Hy Treasurer was incensed that Sir John would give them no discoveries against the Earl of Aberdeen, and that by his father's retrait he had secured his estait from their grip. They caused bring him between a great guard of soldiers, in open daylight, from the Abbey, on foot, to the prison, like a malefactor."

[2] "When in Holland Russians were sent to seize him, but by Providence he made his escape to corners, *diverting himself with the conversation of the schoolmen and scholars of the two famous Universities of Leyden and Utrecht.*"—Impartial Narrative. Somers *Tracts*, Scott's Ed., xi. 532.

[3] MS. Records of Privy Council, Register House, Edinburgh.

comprised accession to the rebellion of 1679, the Rye-House Plot, and the ill-fated expedition of Argyle, were fugitated for treason before the Court of Justiciary, but the record[1] bears that "his Majesty's Advocate was satisfied that no Act should be extracted, nor letters of denunciation raised thereupon, before the 16th day of May next to come, in respect the foresaid persons were summoned at his instance to compear before the High Court of Parliament, on 15th day of May next to come, to answer to the cryme of treason laid to their charge, and declared that it shall be free to all persons to correspond with them in the meantime, in order to the said process of treason." Accordingly, on that day the indictment for high treason was called and read in Parliament.[2] The Lord Advocate stated that some of the persons indicted had been already outlawed by the Justiciary Court, but he produced letters of relaxation in their favour, to the effect of giving them *persona standi in judicio*, that they might defend themselves before Parliament. Sir John Cochrane and several others were tried and forfeited, but the most of those charged, including Stair, were, by an Act passed on 15th June 1685, remitted to the Justiciary Court.[3] The reason for this does not clearly appear, but probably it was because the witnesses against them were not forthcoming.

As regards Stair, Carstaires, whose deposition on torture before the Privy Council had been a chief item in the evidence led in Parliament, said only, "The deponent spoke to Lord Stairs, but cannot be positive that he named the affairs to him, but found him shie; but the Earl of Argile told him he thought Stairs might be gained to them."[4] This could

[1] MS. Justiciary Records, 16th March 1685, Register House, Edinburgh.—Fountainhall, *Decisions*, i. 353.

[2] Act. Parl. viii. App. 32.

[3] Act. Parl. viii. 490.

[4] See, as to Carstaires' depositions on torture 5th and 6th September 1684, Fountainhall's *Decisions*, i. 30; but the substance of his depositions is there only loosely given, and I have taken the exact words with regard to Stair from the Depositions appended to the Indictments.—Act. Parl. viii. App. 35.

scarcely be deemed sufficient even by judges who gave the widest scope to constructive treason.

Further evidence had been wrung, by the same infamous means, from Spence, Argyle's servant. He long persevered in refusing to make any discoveries. On 26th July 1684 he had, after torture, been delivered to General Dalzell, who, it was reported, "by a hair shirt and pricking (as the witches are used) kept him 5 nights from sleep till he was turned half distracted."[1] On the 7th of August his thumbs were crushed with pilliwincks and thumbkins, a new invention[2] brought by Dalzell and Drummond (who now sat constantly on the Privy Council) from Muscovy, and being threatened with the boots, he desired time, promising to declare what he knew.

Accordingly, when next[3] brought up before the Council he deponed that "Argile, London, Campbell, late President Stairs, Sir John Cochrane, and others, had formed a design to raise ane army in Scotland, and to land at such convenient places as they hoped the people would joyne with them, and hoped, if they once gave the king's forces a foyll, they would get many to flock in to them, and had advanced money to this purpose." It is impossible to say whether any reliance[4] can be placed in testimony so obtained—nor is it of much consequence. There can be little doubt that whether he actively abetted it or not, Stair, as the other Scotch fugitives in Holland, would have rejoiced in the success of the expedition of Argyle. Of the other charges against him there appears to have been no evidence. Probably that of complicity in the rebellion of 1679 meant only that persons

[1] Fountainhall's *Historical Notices*, 545. [2] Fountainhall, *ibid.* 548.

[3] Fountainhall, *ibid.* 552. See also Fountainhall's *Decisions*, i. 301. This was on 22d August 1684.

[4] Fountainhall says as to one of his former examinations, "Yet all this while he discovered nothing; and though he had done it, yet little credit was to be given as to what he should say at such a time."—*Decisions*, i. 299.

engaged in it had taken refuge on his estates. In the Rye House Plot it seems to be in the highest degree unlikely that he had any share.

The trials before the Justiciary Court took place in December:[1] the libels were all found relevant, and evidence having been led against James Stewart, formerly Provost of Edinburgh, afterwards Lord Advocate, Sir William Denholm of West Shiells, and Mr. Gilbert Eliot, they were found guilty, though absent, and sentenced to be executed when apprehended.

No evidence, however, was adduced against Stair. A necessary witness, Sir John Cochrane, who appears to have been expected to turn king's evidence, not having come home,[2] the proceedings were continued by successive adjournments until 1687, when they were altogether dropped.

The cause of this was the appointment to the office of Lord Advocate,[3] on the 21st of January of that year, of the Master of Stair, who had made his peace with James, and succeeded to the office in place of Sir George Mackenzie dismissed for refusing to consent to relax the penal laws against

[1] They had been cited at the pier of Leith, on 24th September 1685, on a citation of sixty days.—Fountainhall, *Decisions*, i. 370.

[2] On 24th September 1685 Stair had been cited, on Sir John Cochrane's delation, to appear in sixty days before the Criminal Court.—Fountainhall, *Decisions*, i. 370. 21st December the case came on, and the same author observes, "As for Stair they wanted one of their witnesses, viz. Sir John Cochrane, who was not come home." See also Wodrow, ii. 231-2.

[3] His patent, dated 21st January, was read in the Justiciary Court 21st February. 17th February 1687, at Privy Council, Sir John Dalrymple is admitted King's Advocate, and by a special letter the test is discharged to be administered to him, though this was not very necessary, because the king's letter for a toleration was also read, which discharged the test in general, and submitted a new oath in its place, and gave indulgence and permission to some of the Christian persuasions, viz., the moderate Presbyterians, Quakers, and Papists, and dispensed with the penal laws against them.—Fountainhall, *Decisions*, i. 448. MS. Justiciary Records, Register House, 28th March 1687.

the Papists. On the 28th of March a remission[1] in favour of Stair and his family, to which was oddly joined a pardon to the young son of the Master, afterwards Field-Marshal Stair, for having accidentally shot his brother, was recorded in the books of Justiciary. The Master of Stair only remained Lord Advocate for a single year, when Sir George Mackenzie again returned to the office, which he held till the Revolution.

The cause of these sudden changes, Wodrow says he leaves "to the civil historians," but none of them have given an explanation of it. The author of the *Impartial Narrative*, who is a professed apologist of the Master of Stair, gives the following account:—"There being none of the advocates fit to be King's Advocate, the Court hoping to gain him to their party, and to wheedle his father over from Holland, made the Master King's Advocate (that being the time of the toleration), and during a whole year he continued King's Advocate there was none prosecuted to death but one man on the score of nonconformity. The Court perceiving the Master's behaviour in that post that year, intending to take another course by the dispensing power, and finding him not to be a fit tool for their purpose, brought in Sir George Mackenzie again to be King's Advocate, and they degraded the Master to be Justice-Clerk."[2]

No palliation, however, can be admitted for the acceptance of office from such a Government. It remains a blot on the character of the Master of Stair, which, like the deeper stain of Glencoe, will never be removed from his memory.

Stair declined to accept the proffered pardon, and continued in Holland,—to return under happier auspices in the following year.

[1] "He brings also home with him an ample and comprehensive remission of all crimes to his father, my Lord Stair, to his mother, his brethren and sisters, and particularly for their reset and converse with traitors, and to his little son, who accidentally shot his brother."—Fountainhall, *Decisions*, i. 447.

[2] Somers *Tracts*, Scott's ed., ii. 553.

CHAPTER XI.

1688-1692.

Stair accompanies William of Orange on his voyage to England—Lands with him at Torbay—Remains in London during the Convention of 1689, but takes active part in Scotch affairs—Proceedings of the Convention—Stair's criticism on the vote declaring James had forfeited the Crown—Commissioners from Scotland sent to offer Scotch Crown to William—William takes Coronation Oath, and makes declaration in favour of toleration—Master of Stair Lord Advocate—Other Officers of State—Stair appointed President of Court after death of Lockhart—His letter to Melville as to management of Convention—Parliament meets—Origin of the Club party, or the Patriots—Their conduct—Battle of Killiecrankie—Votes carried by Club in Session of 1689, but not sanctioned by the Commissioner—One of these votes directed against Stair—Anonymous pamphlet in support of the votes—Stair urges that this should be answered—Stair's Apology—Created Viscount—Nomination of the new Session—Stair's account of their first meeting—His speech to the advocates—Letters to Lord Melville as to conduct of the Club, and state of affairs in Scotland—Coolness between Melville and the Dalrymples—Stair's last letter to Melville, 30th January 1690—Parliament of 1690—Its proceedings—Concessions of William—Stair member of Committee for Settlement of the Church—Measures passed for that purpose—Visitation of the Universities—Stair a member of Commission—Master of Stair supersedes Melville—Proposal to embody militia—Stair's diplomatic conduct in the Council—His prosperity.

ALTHOUGH Stair had the strong and happy but rare frame of mind which can pursue its studies and perform its work undisturbed by adversity, and consoled his exile with philosophy, he was far from having abandoned an active for a meditative life. Whether or not he had been privy to the expedition of Argyle, it is certain that of the many British refugees[1] who then filled the cities of Holland, none threw himself more eagerly into the plans of William of Orange to save Britain from the arbi-

[1] As to the English at the Hague, see Macaulay, *History*, ii. 454; and at Utrecht, *Life of Howe* by Calamy, p. 146.

trary rule of James II. and introduce a settled constitutional government. He had been introduced to the Stadtholder at the Hague[1] by the Grand Pensionary Fagel, one of the most tried friends of William, the skilful adviser by whom his Declaration to the people of England was written. A few days before he embarked for his voyage for this country Stair had an interview with William which must have reminded him by its similarity and its contrast of his conference with Monk nearly thirty years before. As he had then pressed on the English General the necessity of a free Parliament, so he now asked the Dutch statesman what his true design in going to England was? The prince answered that he designed the glory of God and the security of the Protestant religion, then in imminent danger. On which Stair, we are told, pulled off his wig, a minute touch which vouches the authenticity of the story, and pointing to his bare head said, "Though I be now in the seventieth year of my age I am willing to venture that, my own and my children's fortunes in such an undertaking."[2]

He accordingly embarked on 16th October 1688, accompanied by his son the Master of Stair and his young grandson, afterwards Field-Marshal and French Ambassador of George I., in William's own ship "The Brill,"[3] at Helvoetsluys. They landed on the 5th of November at Torbay on a calm morning, after encountering two storms, one off the Dutch coast, which forced the fleet to put back to Helvoetsluys, the other when in sight of the English shore.[4] At the landing Stair's horse was not forthcoming, perhaps having been lost in the storm, and he

[1] "Before the king had left the Hague Fagel had so effectually recommended Dalrymple the father to him that he was resolved to rely chiefly on him for advice."—Burnet, *History of his Own Times*, ii. 24.

[2] Crawfurd's *Peerage*. Crawfurd had received materials from the Dalrymple family.

[3] Dalrymple's *Memoirs*, p. 217, who, however, quotes erroneously Crawfurd's *Peerage* as his authority for the fact.

[4] For an account of this memorable voyage see Macaulay's *History*, ii. 470.

was supplied with a Neapolitan one from his own stud by William,[1] who from this time forward showed a firm friendship to him and his family. Such constancy towards those who served him is one of the traits in which the great king contrasts favourably with the fickle Stewarts.

In the Scotch Convention of Estates in 1689 the Master of Stair took the leading part, but Stair himself was not a member, having remained in London during its sittings. It met on the 14th of March, having been called together[2] by the Prince of Orange on the suggestion of the large body of the Scotch nobility and gentry, including Stair, then assembled in London, who held frequent meetings at the Ship Tavern in St. James's Street.[3] Between this body, the supporters of William in Scotland and the prince himself, now chosen king of England, Stair was the active intermediary.

It was on his suggestion that the members of the Convention were elected by a wider suffrage,[4] and that proposals for a settlement of the Government under the prince as king of Scotland, and for a union of the two kingdoms, were at once brought forward.[5] Few Jacobites attended the Convention, of

[1] Crawfurd's *Peerage;* Forbes's *Preface*, p. 37.

[2] Mr. Burton, *History of Scotland*, vii. 18, says :—"It was a Convention which had come together without the royal authority;" but from the Record of its Acts it appears that it was called by circular letters from his Highness the Prince of Orange, under his hand and seall to the Lords of the Clergie and Nobility, and to the Sheriff Clerks for the several shires, and to the Town Clerks for the Royal Burghs.—Act. Parl. ix. 3.

[3] Balcarres Narrative, Somers *Tracts*, Scott's ed. xi. 502 :—"Every night after they were once gathered together they kept their meetings in St. James's Street, in the Ship Tavern; there they consulted what was next to be done both to get the Government in their hands and how to hinder all others who were not of their party;" and see also 504.

[4] "Dalrymple, the late president, had artfully provided in the address to William that none but Papists should be excluded from the legal vote, and that the election should be conducted in burghs by a poll of freemen, from which, it is to be regretted, they have since departed."—Laing, ii. 184.

[5] The Scotch Parliament appointed Commissioners to treat concerning the Union on 23d April.—Act. Parl. ix. 60

which the Duke of Hamilton was chosen President by a small majority in preference to the Marquis of Athole.

The Convention, after taking the necessary measures for securing the peace of the kingdom, heard the letters read which had been addressed to it by the prince and by King James, but before opening the latter declared that, notwithstanding anything contained in it, "they are a free and lawful meeting of the estates, and will continue undissolved until they settle and secure the Protestant Religion, the Government, Laws, and Liberties of the Kingdom."[1] They then returned thanks to William for his letter, and to their countrymen in London for their address to him. As to the proposal for a union, they declared that they had no doubt "his Majesty would so dispone that matter, that there may be an equal readiness in the kingdom of England to accomplish it as one of the best means of securing the happiness of these nations and settling a lasting peace." At the meeting of the 4th of April a resolution proposed by the Master of Stair was carried, by which it was declared that James had "forefaulted" the right to the crown, and that the throne had become vacant. The reasons for this vote were appended in fifteen articles, which were on the 11th embodied in the Declaration and Claim of Right.[2]

It is characteristic of the difference between the father and the son that this expression of the forfeiture of the crown by James, which occasioned much remark both at the time and since on account of its difference from the English vote, in which the word used was "abdicated," was deemed by Stair too harsh. He writes to Lord Melville, who had been sent by William to Edinburgh to overlook the proceedings of the Convention, on 9th April :—"The vote of vacating the Crown is but preparatorie; and the term of forfating the King's right seems harsh, implying that the Conventione hath a superiority of jurisdiction, whereas the solid ground is that the King having

[1] 1689, c. 2, Act. Parl. ix. 9. [2] 1689, c. 13, Act. Parl. ix. 38.

violated the constitution of the kingdom in both its sacred and its civil rights, the Convention, as representing the body politick, did declair that seeing he had violat his pairt of the mutuall engagements they wer frie of their pairt, for they could not fail on the on pairt without fredom to the other to liberat themselves, and seing the violations wer so high as to refuse, reject, and renunce the government of the kingdom according to its trew constitution, and to assume a despotick and arbitrary government, nether he nor any come of him after that could have any title to reigne, and therefor disclaiming for King William and Queen Mary the administratione, being in them alone during his lyf. There is a great difference between disclaiming or renuncing a government and other violations; for that doeth lose the right, *ipso facto*, whereas other violations do not, but only give the enjured liberty to loose themselves; as adultery doth not dissolve a marriage *ipso facto*, but gives the enjured libertie to loose themselves." [1]

The same day on which the claim of Right was agreed to William and Mary were declared in an Act, whose language resembles a clause of destination in a Scotch deed of entail, King and Queen of Scotland during their joint lives, and the longest liver of them, the sole exercise of the regal power being vested in William during their joint lives, and after their decease the Crown was to devolve on the heirs of the body of the queen, whom failing, the Princess of Denmark and the heirs of her body, whom failing, the heirs of the body of William.[2] Immediately after the meeting adjourned William and Mary were proclaimed king and queen at the Cross of Edinburgh.

It was, however, subsequently voted that the Government should continue as at present until they had accepted the offer of the Crown,[3] and a list of grievances and an oath to be taken by the king and queen having been drawn, the Earl of Argyle,

[1] Leven and Melville Papers, p. 9.
[2] 1689, c. 13, Act. Parl. ix. 40.
[3] Act. Parl. ix. 41.

Sir James Montgomery of Skelmorlie, and the Master of Stair were nominated as representatives of the three estates to present to them the Declaration and the grievances, and to take their oath.[1]

On the 11th of May in the Banqueting House at Whitehall William and Mary took the oath, which was read to them by Argyle in the presence of a number of the English nobility and all the Scotchmen of note then in London,[2] a scene from which we may be sure Stair was not absent. When he came to the last words of the oath, by which he declared "that he was to be careful to root out all heretics and enemies to the true worship of God that shall be convicted of the true kirk of God of the foresaid crimes," William required an explanation that persecution for religious opinion was not intended and made a declaration in favour of toleration.

There had been a difference between the Commissioners as to the order of proceeding. The Master of Stair, a consistent opponent to the diminution of what he deemed the constitutional rights of the king, had proposed that the oath should be first taken, and the grievances, as well as an address which had been sent up by the Commissioners for turning the Convention into a Parliament, afterwards presented on the humble desire of the people.[3] In this he had probably been supported by the advice of his father, but the order proposed by the other Commissioners was followed,[4] and the oath taken only after the Claim of Right, the grievances, and the address had been read.

[1] Their appointment, 24th April 1689, Act. Parl. ix. 60. Their instructions, 25th April, p. 62. [2] Macaulay's *History*, iii. 290.

[3] Sir W. Lockhart, Leven and Melville Papers, p. 159.

[4] The Commissioners sent by you "have presented your letters to us, with your Letter or Claim of Right, the grievances, and your addresses for turning you into a Parliament, which were all read in our presence: after which the queen and wee did take and signe the oath tendered to us by your said Commissioners, which (by God's assistance) we shall religiously observe."—William's Letter to the Convention, Act. Parl. ix. 93.

The part they took upon this occasion was one of the charges afterwards brought against the Dalrymples, when the storm of unpopularity, whose origin we shall presently trace, burst over their heads.

Amongst the ministry for Scotland, or Officers of State, as they were usually called, Sir John Dalrymple received the place of Lord Advocate. This office, though not of the same importance then as now, was the highest open to a commoner. The Commissioner to Parliament was the Duke of Hamilton, chosen rather for his rank than his merit, and the Secretary of State, or Scotch Prime Minister, was Lord Melville, an honest but not brilliant statesman, who had been the companion in exile of Stair and the friend of William. On the death of Lockhart Stair was reappointed President of the Court of Session. "That shamefull murther of Sir George Lockhart," he writes to Melville on 9th April, "towched the king much, and made him say to me he saw it now necessar that I sould resume my place againe, which I was willing, though it was my right that he sould enjoy, being younger and abler to endure the toyle than I."[1] A letter from him to the same nobleman two days later shows how busily he was engaged in all the measures which were then on foot for the settlement of Scotland.

"My dear Lord,—I recaved yours of the 4th instant, and I wrote to you evry post. The express was not dispatched be reason of the Coronatione, which was this day very splendidly performed. I desyred the king to wrytt to you with his own hand, which he promised to doe, though he did not so to D. H.[2] I had gotten a warrant for Lord Leven's regiment to march to Scotland by Chester, bot I thoght it unnecessar to bring a handfull of strangers that way, and to retard the officers. I could not get it renewed for throng of this Coronatione, but I resolve to get it dispatched now. I hope the king with this express will invite the Conventione to levy, and send most

[1] Leven and Melville Papers, p. 9.

[2] Duke of Hamilton.

of them with Mackaye's partie to Ireland. He seemed so inclined, if he be not diverted. I mervell the Conventione moved nothing of it to him. I am still of opinione that it is of extreme danger to adjourne or weaken the Convention by the offer of the Crowne, which, thogh it was solemne heir where some hours did it, is not necessar at such a distance be mor than one or tuo; and in the meantyme the Conventione may go on to secure the countrye, and to order what remains. It may be some may keep things off that ther may first be made a Parliament which, how necessar or fit it will be till the King and Queene be crowned want not difficultie; and there is no hope they will go to Scotland for that purpose. So long as ther is any hope of unione the Conventione is mor proper to declair against and annull encroachments than a Parliament. You know how unwilling any was that did anything of importance as commissioner[1] to returne to ther former statione. I doe not thinke it prudent to urg thes who withdraw[2] to approve what is or sall be done; for though necessity make them comply it will but provock them mor, and if they see any hope, give them a fair pretence to breed trouble, especially at this juncture. I hope you will not forget to alter the oath of allegeance on heirs and to lay asyd the other oaths and acknowledgments on the first part of the test, *and to qualifie tortur that it never be used, bot when there is one witness or half probatione,* nor the litle Act in bulk, bot greatir import of vacating the settled Judicatories by cumulative commissioner. The bishops have so signalized themselves by oppositione that thereby and by withdrawing of their friends I hope they will not be weighty now.—My dear Lord, adieu."[3]

He again writes from Hampton Court on 21st April:—"My dear Lord,—I have frequently urged the dispatch of

[1] This means, I presume, all the leading Commissioners to the Convention were in search of places.

[2] The Jacobite members.

[3] Leven and Melville Papers, pp. 10, 11.

this bearer. I did desyr the King might wrytt to you, which he promised, bot it was still delayed, till at last yesternight he was dismist with a letter to your son, bot non to yourself. He came to me to Ham shewing the sam, and thogh it was this day I have attended most of the day and behoved to rest satisfyed that the Earle of Portland sould wrytt as from the King, and sould invit you to come up hither, your advyce being so necessary at this tyme when places are to be setled, in which I forbear to move till you come. What the King will doe as to levies ther or sending money, which I urged all I could, not only for levi money bot for taking off thos who might continow or breed trouble, only he told me that he had sent with Mackay ten thousand pound. I said that might be for paying his pairtie. He said no, bot for extraordinar exigencies. It was thoght strange why ther was neither express messenger nor pacquet to signify the proclamatione of the King and Queen, and I think it very strange that the greivances are only proposed to be amended it seems be a Parliament; whereas if if they had been declaired encroachments unwarrantable they needed no more bot the King's approbation.

"However it is very necessar that ther be some dispatched up that ther may be an end. I hope you would have been as thogh the King's call had not been; but I thoght but to secure it, for I hear all the members are prohibit to leave the Conventione without leave.—My dear Lord, adieu."[1]

It was probably owing to the urgency of Stair that the Scotch Convention sent at once the Commissioners to London, whose proceedings have been already noticed. The Convention, apparently not satisfied with their conduct, appointed the Duke of Hamilton, Lord Ross, Sir Patrick Home of Polwarth, and Mr. William Hamilton to wait upon William to give him information upon some things expedient to be known[2] before the meeting of the Parliament; but these Commissioners never

[1] Leven and Melville Papers, p. 14.

[2] Act. Parl. ix. 94.

went. One object of their appointment undoubtedly was to counteract the influence of Melville and the Dalrymples in the King's counsels.[1]

The King by his reply to the letter of the estates, which contained his acceptance of the Crown, had complied with their request that they should be turned from a Convention into a Parliament, and accordingly the Convention was adjourned on 24th May, and met on 5th June as a Parliament, presided over by the Duke of Hamilton as Royal Commissioner, who was thus kept in Scotland in a post of great dignity but little influence, in which he fretted at the advancement of Melville.

This Parliament sat till 11th August, and with the single exception of the Act abolishing Prelacy nothing of any importance remains as the result of its labours. No more fruitless Parliament ever sat in Scotland. This was a consequence of the proceedings of one of the most violent and unscrupulous Opposition parties that has existed in any country where parliamentary government has prevailed—a warning that parliamentary forms may easily be abused, and that the claim to exclusive public virtue as well as the name of the Constitutional party may be made to cover party and personal ends. The formation of this party was due to two disappointed suitors for office—Sir James Montgomery of Skelmorlie, who had aspired to be Secretary of State for Scotland, and Lord Ross, who wished to be President of the Court of Session. Along with Lord Annandale and many members of Parliament, some of them, as Fletcher of Saltoun and Sir Patrick Home, more honest than themselves, they organized what was called by its opponents the Club, and by its supporters the Country party, in contradistinction, not to the members for the burghs but to the Courtiers or King's party, which Sir John Dalrymple, ably seconded by Sir William Lockhart, led with conspicuous busi-

[1] See Leven and Melville Papers, p. 25.

ness and oratorical talent, but with an imperious temper not likely to conciliate his adversaries. The Club, which held stated and formal meetings in Preston's Tavern in the High Street in order to organize its conduct in Parliament, concerted a series of measures which were intended to limit the royal prerogative, and had in many respects a plausible popular aspect, but the future conduct of its leaders in allying themselves with the Jacobites and plotting for the restoration of King James proves that the result of their success would have been, if not a despotic, at least an oligarchical government for Scotland.

While the patriots were engaged in the struggle for offices and in plots Scotland had been all but lost to the new Government. The Convention sat in terror lest the guns of the castle held by the Duke of Gordon might at any moment be turned on them. Dundee suddenly quitted Edinburgh, refused to return when summoned to answer the charges against him, and after a short rest at his country seat of Dudhope rallied round his standard the Highland clans. Mackay, a worthy man and able general, but unused to the irregular warfare of the hills, was despatched against him; and after a short and fruitless pursuit returned to Edinburgh. In a few weeks he again took the field with additional forces,—the three Scotch regiments which had served in Holland, one English, and two newly raised Lowland regiments. He was signally defeated on 27th July at Killiecrankie, where the bullet which killed Dundee turned the defeat into a victory, and decided in Scotland the revolution[1] in favour of William. The castle of Edinburgh had surrendered in June, and Dundee's army, deprived of its head, fell into disputes, and was speedily dissolved. "On the twenty-fourth

[1] The consternation in Edinburgh at the news of the battle before Dundee's death and Mackay's safety were known seems to me to justify this expression, which I have borrowed from the Honourable L. Melville's Preface to the Leven and Melville Papers—a contribution of great value to the history of this period. See the Papers, p. 203, for the reception of the news in Edinburgh.

of August, exactly four weeks after the Jacobite army had won the battle of Killiecrankie, that army ceased to exist."[1]

The Parliamentary opposition, directed by the Club, addressed itself to five points, which it succeeded in carrying by a large majority of votes in the Parliament of 1689.

The first was a declaration "that no person should be entitled to any public trust, place, or employment who in the former evil government had been grievous to the nation by acting in the encroachments mentioned in the Claim of Right, which are declared contrary to law, or had showed disaffection to the happy change of Government." The second related to the Constitution of the Committee or Lords of the Articles, and asserted the right of the Estates "to appoint Committees of Parliament of what numbers they pleased, the three Estates being equally represented, for preparing motions or overtures first made in the House, or that the House may conclude matters without remitting to any Committee or appoint several Committees if necessary, and that the Officers of State were not to be members of Committee unless chosen." The third vote, relating to the nomination of Lords of Session, directly struck at Stair, who had been nominated President by William on 22d October 1689. It declared that where there was a total vacancy in the Bench it should be filled up by the King's nominating fit and proper persons to be presented to Parliament, to be tried and admitted or rejected, and "that the President of the College of Justice shall be elected by the whole Senate thereof." There were other two important votes relating to the Repeal of the Act of 1669, asserting the King's supremacy over all Persons and in all Causes Ecclesiastical, and for Restoring the Presbyterian Ministers ejected since 1661 for not conforming to Prelacy. None of these votes received the Royal assent, the Commissioner having refused to touch the Acts giving effect to them with the sceptre, and a remonstrance for

[1] Macaulay's *History*, iii. 377.

this was addressed to the King by the Commissioners of Shires and Burghs.[1]

In support of this address an anonymous pamphlet was published in Glasgow the end of 1689, which has been variously ascribed to Ferguson[2] the Plotter, and to Sir James Montgomery.[3] It was entitled, "The Late Proceedings and Votes of the Parliament of Scotland contained in an Address to the King, signed by the plurality of the Members thereof, Stated and Vindicated."[4]

The pamphleteer, whoever he was, made a fierce personal attack on Stair with reference to his appointment as President. He charged him with illegally assuming that office on the nomination of Charles II. without the choice of the Senators, contrary to the Act 1579, c. 93,[5] and the uniform practice, except in the case of Sir John Gilmour, whose nomination, though made by the King, had been approved by Parliament. After asserting that "his whole behaviour in that station was of one piece and complexion with his entering upon it, being a continued series of Oppression and Treachery to his country," he thus continues :—"for besides that all his verdicts between subject and subject were more ambiguous than the Delphic Oracles, and the occasion of the commencement of innumerable suits in place of the determinating of any, he was the principal Minister of all Lauderdale's arbitrariness, and of all Charles's usurpation. Nor was there a rapine or murder committed in the kingdom under the countenance of Royal authority but what he was either the Author of, the Assister in, or ready to justify. And

[1] Address to the King. Pamphlets, Adv. Lib. 94, No. 21.

[2] Burton, *History of Scotland from Revolution*, i. 76, says :—"This was attributed from its venomous tone to Ferguson, the celebrated plotter, who could not take up the pen without immediately dipping it in poison."

[3] Sir John Dalrymple's *Memoirs*, i. p. 80.

[4] Pamphlets, Adv. Lib. 94, No. 20.

[5] "It is statuted and ordained that the President of the College of Justice shall be always chosen by the whole Senators of the College of Justice," 1579, c. 93.

from his having been a military commander for asserting the laws, rights, and liberties of the kingdom against the little pretended invasions of Charles I., he came to overthrow and trample upon them all in the quality of a civil officer under Charles II. Nor is there a man in the whole kingdom of Scotland who hath been more accessary to the robberies and spoils, and who is more stained and dyed with the bloody measures of the times than the Lord Staire, whom his Majesty hath been imposed upon to constitute again President of the College of Justice. And as an aggravation of his crimes, he hath perpetrated them under the vail of Religion, and by forms of law. . . . But there being some hopes that the World will be speedily furnished with the History of his Life,[1] I shall say no more of him, but leave him unto the expectation and dread of what the famous Mr. Robert Douglas foretold would befall him in his Person and Family, and of which, having tasted the first Fruits[2] in so many astonishing instances, he may the more assuredly reckon upon the full Harvest of it."

It was not a time when libels could be safely left unanswered, for although Dundee had fallen, a counter revolution was still in the air, and only waited for another leader. Fortunately no such leader was to be found. Stair was naturally desirous that the charges against the Government and himself should be refuted. "My Lord Staire and some others meat last night and perused it," Sir William Lockhart informs Lord Melville on 10th December. "He then thought it absolutly necessarie it shold be answered, and that seing his son, to whom properly it belonged, wold be considered a partie, he thought that I ought to take it in task. He very kyndly offered me his assistance in relation to the grounds; but I was to venter

[1] I have not discovered to what this alludes. Probably the reference is to some satirical life of Stair, then projected, but never published.

[2] The reference is doubtless to the deaths of his daughter Janet, the Bride of Lammermoor, and his grandson, the elder son of the Master of Stair. See p. 81 *et seq.*

on nothing of this kynd without your speciall advyse and aprobation, nor is it to be don without the King's knouledge, because the author impudently asserts several things said to the King be his ministers that are about him, which are no dout false; and that he was invited over be Scots men, which I do not believe; and yet we cannot contradict without the King's allowance, of all which matters, if your Lordship think the thing proper, we shall send you a more particular deduction."[1] Stair himself alludes to it and some of the other designs of the Club against him in a letter to Melville on 1st January 1690:—"My Lord,—I receaved yours of the 27th of Januar, by which, and by the other letters with that packet, the King's coming to the Parliament is mor dubious, which hath immediatlie raised both the Jacobites and the Club very high; they are now in better correspondence, and they say that D. H.[2] not being satisfyed in the post he is stated in, they have no fear from him; they had little hop if the King cam after his concessions are evry wher known. And the great interest to beat the bottom out of the Irish Rebellione (which, if it sould continew a stated warr would have dangerous consequences at hom and abroad), made all believe the King would head that affair in person, thogh thes three leaders of the Club would mak men believe ther was no such thing intended to keepe up ther hop and humours. I do knowe no informalitie or defect in my electione,[3] yet Skelmorlie is on some project for a new elec-

[1] Leven and Melville Papers, p. 342. [2] Duke of Hamilton.

[3] This refers to Stair's election as member for the shire of Ayr, which had taken place on the death of the Laird of Blair causing a vacancy. See the warrant for a new election to the shire of Ayr on Stair's promotion to be a Viscount, Act. Parl. ix. 112: "Forasmuch as upon the death of William Blair of that Ilk, one of the Commissioners for the shire of Aire, there was a Commissione granted by the Barones and freeholders of that shyre to the Viscount of Staire, there designed Sir James Dalrymple of Stair, to represent them in place of the said Laird of Blair, and there being another commission granted by a smaller number of the freeholders of said shyre to the Laird of Rowallan, which was not subscryved by the Clerk of the Meeting."

tione, thogh I cannot dreame of any rationall pretenee. Yesterday the Lady Collingtone presented an appeall to the Parliament; the Lords have done nothing eoneerning it, hoping she will take it up. It will be thoght strange that from on so neir related to your Lordship the first blow against the Sessione should be given; I sall not trouble your Lordship with the cause. I wrott a lyn of it to my Lord Abruchle. I ador God's providence in permitting so much dust against me, thogh the matter (separat from the railing) imports nothing; bot my embraeing first and last the statione God hath called me to, and the malicious ly of my being author, actor, or approver of the eruelties in the former reings, which your Lordship and all unbyased and enformed men knew to be as fals as hell could make it; bot I thank God I have the peace of my conscienee, and I am confident your Lordship will bear witness for me to his Majestie.—My dear Lord, adieu."[1]

Something seems to have prevented Lockhart from undertaking a reply to the libel, and Stair himself, instead of merely furnishing materials, composed the answer, in a small quarto pamphlet of eight pages, which he styled "An Apology for Sir James Dalrymple of Stair, President of the Session, by Himself." In refutation of the accusation of being a time-server, he appeals to his refusal of Cromwell's Tender, the Declaration enacted by Parliament in 1663, and the Test of 1681. "Let my enemies," he exclaims, "then show how many they can instance in this nation that did thrice forsake their station, though both honourable and lucrative, rather than comply with the corruption of the time, or sign anything whence they had not clearness of conscience, as I have done, who quitted my station for the usurper's tender, and for the declaration and test."

To the charge of subserviency to the Duke of Lauderdale in the evil things done during his administration, while defend-

[1] Leven and Melville Papers, p. 361.

ing his memory as one who was most zealous for the honour of his country, a character which history cannot indorse, he replies that he joined in the representations which led Lauderdale to make several Acts of Council correcting abuses, and in particular one which prevented the citation of persons accused for Church offences, without special circumstances of time or place; and that he protested against the orders of Council for bringing the Highland Host into the west of Scotland, and for bringing to judgment the Presbyterian ministers who had kept conventicles.

The pretended obscurity of his decisions, he urges, is due to the libeller's ignorance of law which made them so to him, and with just confidence he adds, "I may say, without vanity, that no man did so much to make the law of the kingdom known and constant as I have done." He appeals also to his publication of the Institutions, which had been so acceptable "that few considerable families of the nation wanted the same, and I have seen them avending both in England and Holland;" and to his promotion of the Act for bringing in processes in their order, "whereas before all depended upon the arbitrary calling of the Lords as they pleased, so that every judge might call his own friends in his own week."

As to the alleged prediction of Mr. Robert Douglas, nothing can be more false and calumnious. Douglas had always expressed the greatest kindness and respect for him, as his widow was ready to prove.

In conclusion, he refutes the only special matter charged against him, the acceptance of the King's nomination to the Presidency without election by the Lords of Session, by a careful summary of the Acts of Parliament and precedents. At the institution of the Court of Session the President was chosen by the King, and he continued to be so till 1579, when a correctory Act was passed, on account of unfit persons being appointed judges during James VI.'s minority. Under this Act the right of nomination was in the King, but the Lords had power to

admit or refuse. The manner of election of Urquhart, Elphinstone, Preston, and the Earl of Haddington, was not extant in the Books of Sederunt. Sir James Skene was presented by Charles I., so was Sir Robert Spottiswood, who continued in office till the troubles, during which time the Lords named their President every session. At the Restoration, by an Act in 1661,[1] it was declared to belong to the royal prerogative to nominate the Lords of Session. In the exercise of this prerogative Sir John Gilmour was appointed without being chosen by the Lords, and upon his resignation Stair himself was named by the King, admitted by Act of Sederunt of the Lords on 13th January 1671, and continued in office till 1681, when Sir George Gordon was appointed in his place by the King, without any consent of the Lords. After Gordon was made Chancellor, Sir David Falconer, and after his death Sir George Lockhart, were named Presidents, both by the King's letters. "But supposing," he adds,[2] "the King had not the right to appoint, yet the disposition of him that hath no right with consent of him that hath right is as valid and sufficient a right as if the consenter had been disponer, and therefore the Lords' consent to his appointment leaves no room for quarrel." "And now, after all this," he concludes, "I appeal to the conscience of all just and unbiassed persons if this libeller hath any just pretence that I betrayed my country by accepting to be President of the Session. I hope those that have charity that men may aim at the service of God and their country more than their own interest, will not conclude that my own interest was the chief motive that made me resume so heavy a burden in my present circumstances."[3]

The Apology will be deemed on almost all points, by impartial judges, a complete defence of Stair. Perhaps the only exceptions which can be justly taken to it are the laudatory reference to Lauderdale, and the account given of the part

[1] 1661, c. 2, and c. 11. [2] Cf. *Inst.* ii. 11. 7, and iii. 2. 8.

[3] *Apology*, printed in J. S. More's edition of Stair's *Institutions*.

Stair himself took in the secession of the advocates, which, as has already been shown, cannot be accepted as the whole truth with reference to that transaction.

Shortly after the publication of the Apology he received a distinguished mark of royal favour by being created a Viscount. His patent as Viscount of Stair, Lord Glenluce and Stranraer, was read in Parliament on 1st May 1690.[1] His appointment as President of the Court had been made on 22d October 1689, and he had been admitted by a unanimous vote of his brethren on 2d November of that year.[2] The Books of Sederunt record that the Lords having elected Lord Newbyth Vice-President, "unanimouslie and heartily acquiesce in their Majesties nomination of the said Sir James Dalrymple of Stair to be President, as a persone most worthy to discharge that trust, and declares that if it had been absolutely at their disposal they would have elected and choosed him constant President."[3] This acquiescence was not wonderful, as most of the Lords had been appointed on Stair's recommendation. The following is his account to Lord Melville of the first meeting of the new judges, which apparently took place the day after his arrival in Edinburgh :—"All the persons nominat on the Sessione mett. My Lord Crafurd, by the warrant contained in the nominatione, produced it. That which cam by the flying pacquet was only made use of. There was non absent but Stevenson ; all did heartily imbrace. The three appointed to try the qualifications did accordingly read the Acts of Parliament bearing the qualificationes requirit for the Lords, and removed each of thes that were in the additione in order ; and all that war approven joyned in examining the subsequent, and all were unanimously fownd qualified according to the Acts of Parliament ; whereby there was a quorum of nyn approven

[1] Act. Parl. ix. 112.

[2] See List of Session in Leven and Melville Papers, p. 307.

[3] MS. Books of Sederunt, Register House, Edinburgh, 2d November 1689.

who did authorise two of their number to exam the fyve first nominat upon ther own desyre and submissione to tryel; becaus be the tenor of the nominatione the first fyve wer acknowledged to have been admitted, and so could not be tryed as intrants without ther own consent; and therefor, according to the ordinar and regular custom of sessione, two were appointed to try and report, which reported that all the fyve wer qualifyed. This day, the report being made and fourteen approven, Crawfurd was again called, who took the oath of allegiance of these new last named, and the rest desyred to renew the same, which was done accordingly, and immediately the Lords in their robs tok ther places, and entered upon ther charge. Ther was a pargment scroll prepared, wherein all did subscryve the oath of alleagance; and thes who were not restored took the oath of de fideli administratione. Upon occasion of the fyve Lords submitting to tryell, I told the Lords that tho' I was restored be way of justice according to the King's declaratione, yett I was willing to submitt myself to the Lords, that if they wer not satisfyed that I sould resume that heavy charge, I would not in so disquiet a tyme, and in such an age, subjeet myself to so much trouble and toyl, and thereon I removed. Upon which they did all unanimouslie vote that they did acquiesce in my nominatione at first to be President, and in the King's renewing it and restoring me; and did declair that if the King had left it to them simplie they would all choose me; and did consent to the nominatione already made. This will take of pretences to make noyse in Parliament. I must say there was never so good a constitutione of the Sessione, being all persons of considerable interest, and natural abilities, and most of acquyred skill, and men of integrity. I hear of no noyse as to this matter. I know not what some that ar on ther way may kendle. I hope when people fall about ther privat affairs, and see the King in sic splendour of his renge, they will be less taken up with State

matters. I dowbt not bot er this come to your hands all the other publick affairs will be dispatched which is most necessary. That which grieves me much is Stevensones demurring, from no ill principle I am sure, bot from his modesty and opinione of his unfitness, never having applyed himself to law. I have endeavoured to tak off his grownds, and this day Arniston, Anstruther, and I reasoned fully with him. He will give you an accompt himself; bot we left at this, that if the King did insist, notwithstanding his pretended inhabilityes, we would not doubt bot he would comply with so gracious a Prince, to whom he has all allong showne the greatest affectione. The greatest difficultie I find heir is, that ther is no more fownde to pay the forces, and it will be very inconvenient to disband most of them at this tyme; but if the King would desyre thre regments at least to be sent to Holland, wher that number hath always bein of Scots since they wer a Commonwealth, to remain ther till all were settled, at which tyme the old regments might returne, and would send part of the rest to Irland, ther would be persons found to advance money for their pay, on privat credit, for six per cent, till the fitt tyme of their transport in the spring; bot when ther is no solid ground for ther repayment, it is not to be hoped any will advance.—My dear Lord, adiew."[1]

Strenuous efforts were made by the Club and the Jacobites, when they found their attempt to prevent a new nomination of the Session, and to keep the Signet shut, had failed,[2] to dissuade the advocates from attending the Court; but on the 12th of November Sir William Lockhart writes to Melville: "The Lords having appointed this day for the advocates to attend, ther did apeir in the guns of the ablest to the number of 24, who are sufficient to serve the liedges; but, my Lord, *to speak plainly, I fear much more the want of monay than lawers to receive it*, and am sadly apprehensive our number will double

[1] Leven and Melville Papers, p. 313.

[2] See Burton, *History of Scotland from Revolution*, i. 71.

before Saturday. The President called us in, and mad us a very kynd, discreet discours, extreimly satisfying to all. Maters heir are in grat quietness and order; only from London we have severall accounts that you think ther the mobilie[1] will raise the Session, and that we are to have protestations for remeide of lawe; but if the Club have nothing else to look to, I aprehend they will be much disapointed, especially if the King cause use those who aime att Club lawe with you as they deserve."[2]

Two letters from Stair to Lord Melville, towards the close of this year, bring before us another device of the restless opposition to render government impracticable, and a simple but ingenious expedient by which it was defeated, it is probable on the suggestion of Stair.

"EDN., *Dec.* 5, 1689.

"MY DEAR LORD,—I saved yowr Lordship the trouble of wrytting immediately to yow whill my son was there; but now, I suppose, he will be on his way er this come to your hands. You will sie by the Counsell's letter what hath been done by them since I cam to this place. Your freinds thoght fitt to give the full vein of what was done, and the state of affairs, befor others that were cuming downe did come, to whom all might be attributed. We must not want a Club even in the Counsell, wher two or three retard us, and refuse both to vote and to signe when they please. It had been of late accustomed to bring all in equall condition of what was done, to caus all signe every thing of moment, which custom did oblige all to signe thogh ther vote wer contrair, and yett ther subscriptiones did not import ther vote to have been affirmative, bot only that the pluralitie of the Counsell was for the affirmative; bot seing thes refused to signe bot when they pleased, the king's service behoved to be made ineffectual, seeing

[1] The word *mob* seems not yet to have reached Scotland. Macaulay remarks, *History* i. 256, on the authority of North's *Examen*, that it was first heard in England in 1679.

[2] Leven and Melville Papers, p. 322.

if the Counsell wer bot a quorum of nyn, thogh eight were affirmative, and bot on negative, it wer not an Act of Counsell, and so every on had a negative. Therfor the Counsell enacted that the President only sould signe. Some made a great attempt for an adress to the King to call the Parliament sooner than March; but we broght it only to a modest significatione that we wished the king's affairs might soon allow the anticipatione which he mentioned in his proclamatione, which tooke the others off ther separat adress, and will allay the keinness of others against that adjurnment. Things goe well on in the Sessione, and ther is work enough. Some attempts wer mad against Mr. Justice to be clerk, on Rory M'Kenzie's demissione, and opposed the passing the gift, bot it was carried over them, and he is to be admitted be the Lords to-morrow. On occasion thereof, the Lords resolved that they would represent to the King the grant of King Charles, that the Lords might present fitt persons to be ther Clerks to the Lord Register, and modifie suitable gratificationes which by the sic clerks would make a nursrie for Lords better much than taking Advocats from the barr, who knew little what was don within dors, and wer long er they would forget their clients; but nothing is yet done in it. My Lord Cardross beheaves well and wysly in the Counsell; and the benefit of the coynage being of late much limited, will not be able to support him, especially if his regment wer disbanded. If, therfor, he wer in one of the commissiones, a little addition might make him well, and truelie I see few we hav lyk him. Ther is a letter of the Counsell in favour of the Master of Cathcart. I entreat your Lordship to help him in it. You know their familie is low, and two upon it; and I may say ther is not a man in that countrye hath a greater influence ther, and is both forward and able to serve the King. The Major is a bred souldier, was four years in Dumbartans regiment, and ther is on of the oldest Captains that was six years in the same regiment; few of our new forces

ar so well provyded. The harmonie and kyndnes amongst your friends heir, I hope, will both advance the king's service, and be for your credite and security, which sall always be endeavoured by me and myne.—My dear Lord, adieu."[1]

In the second letter, Stair writes on 12th December :—

"My Lord,—I suppose my son will be on his way er this come to your hands. I did wrytt formerlie to him to be proposed to your Lordship, now I must give you mor trouble by wrytting to yourself immediately, thogh for most pairt I will tell my thoghts to your sones, with whom I have keept and will keepe a closs correspondence, and our common interest will requyer it mor and mor. We had fashrie of bot a few in the Counsell, who would bot vot when they pleased, and signe when they pleased, so that we had difficulty in getting a signing quorum. It was bot jimp at the passing the proclamatione for an adjurnment; and for want of it the opening the Signet was marred the first tyme. Tho' ther were a quorum present and voting, yet ther were bot eight affirmative and willing to sign. Heirupon the Counsell latlie, after long debate, insisted that in all cases the President of the Counsell sould only signe *in præsentia dominorum*. Our reason was, that as the king's service could not be carried on, for a Counsell of sixteen (which was mor than the ordinar number) might deliberat and vote bot to no purpose, because nyn would not signe yea, a Counsell of nyn, which is a quorum, could doe nothing unless all agried, and so every on had a negative; therfor either all behoved to signe tho' ther opinion was contrair, or els the President only. The signing of all did not import ther own opinion, bot the opinione of the Counsell. What a strange thing would it be to sie a large quorum of the Counsell, and bot a few signing; so the vot past that in all cases the President sould only signe. This day the D.,[2] being his first sederunt, refused to signe alone,

[1] Leven and Melville Papers, p. 339.

[2] Duke of Hamilton.

and said it was the custome of the Counsell that it was necessar nyne sould signe, and said he would not. It was at last resolved the King sould be wrytten to to know his pleasure, which must be quicklie dispatched, or most thing will stick. To ordain all to signe will disgust many, bot that the President only signe will bot displease on who will not stick at it if it be the king's pleasure.—My dear Lord, adieu.

"Tho' the D. sometymes refused to sign when he was negative, the ordinar custom was that all signed als well affirmative as negative."[1]

About this time we find Stair again occupied with the care of the Registers. Scotch lawyers often express their pride in the perfection of this part of their legal system. It is well it should be known how constantly the attention of the heads of the profession in the seventeenth century had to be directed to them in order to produce this perfection. "My Lord," he writes to Melville on 17th January 1690, "I have receaved a commissione directed to the Earle of Southerland, to your Lordship, and to the Advocat to take Tarbett's oath that he hath not embazled the Registers, with his oath therupon. The Lords have appointed some of ther number to take inspectione of the registers, as was done when Glendoike cam in place of Caringtowne. Ther is yet no warrant to give Tarbet an exoneratione. Ther was a letter of the King's at the tyme to inventer the registers, to receave and deliver them, and to give exoneratione. The Lords have ordered that I sould give notice heirof to your Lordship that if you see it fitt a letter may be sent by the King to give exoneratione to my Lord Tarbet, and to inventar that pairt of the registers that is come in since the former inventar, which is insert in the books of Sessione, which will be very convenient for preserving the registers, and letting the lieges know wher they may find such registers as they need to make use of, whereof the ignorance cost many dear,

[1] Leven and Melville Papers, p. 346.

being necessitat to give great compositiones for finding out and extracting ancient wrytts. Ther is litle news heir. I know you will get news from your frieuds heir. I am holden so hard to work that I have little tyme, only the heads of the Clube are come doune full of humour and dissatisfactione. All things done heir in the King's service ar under the most sensorious observatione. The best expedient I know is that the donative to the Ministers wer sent doune that they might be ordered to meet for ordering it, and then they may be put to it whether they will franklie tell their mynd that thes animosities of thos who pretend great influence upon them may be lad asyd, which certainly would lay them low. *Ther ar some appearances and much report that they are playing in with the Jacobites;* two of them in Counsell wer zealous to set Dunmor at liberty on catione. We are in great hop of the King's coming.—My dear Lord, adieu."[1]

The differences which arose betweeu the Dalrymples and Lord Melville, aud the causes which led to the latter being superseded in the following year by the Master of Stair in the government of Scotland, have not yet been satisfactorily explained, but the following letter from Stair in the beginning of 1690 shows that the coolness was of considerable duratiou. About the same date there is a marked change in the tone of the Master's correspondence with Melville. "My Lord," writes Stair ou 21st January, "I was not a little surprised upon the sight of a letter of yours to my sone, bearing that your Lordship had information of somthing concerning him or me that yow would not believe till you heard it from some of us, which you would not express, bot that we might easily know what it was. All I can conjectur is that we ar either diffident of your freindship or disobliged. I have lived with you in the intimatest freindship for many years, when we had nothing to divert us from dailie convers with the fullest sincerity and open-heartedness imagin-

[1] Leven and Melville Papers, p. 373.

able, and God knowes I never had distrust of your freindship or kyndness, nor did I ever show any such thing to any; thogh I have been belaboured to beleive the contrary I never did it, and I sould conclud that ther could be no trust amongst men if either I sould be diffident of you or you of me. You know how much it hath been the endeavour of our common unfreinds to breed divisione or jealousie amongst us. It hath still been the persuasione and mutual resolutione of my son and me to be subservient to you with all we are able to doe, being convinced that it was the interest of honest men, and that any alteratione as to you would certainly cary the same effect as to us. That malicious lybell latly printed, and all of that sort put us into one scale; but when it maks so bold with the best of kings I am less concerned, thogh I hope all thes calumnies will be dissipat, and that I and my son ar so run at may very evidentlie shew it is an unreserved faithfulness and forwardness for the King, in whois justice and goodness I have so full confidence that I rest in the peace of my conscience upon it. Your friend Aberuchell, who goeth hence to-morrow, will shew you what harmonie is in the Sessione, not the least appearance of factione or parlying which I have sen and felt in former tymes. I am confident the natione was never better provyded in judges. It is very happie that the King comes, without which I dar not yett say things will goe well.—My dear Lord, adieu."[1]

Only one more letter from Stair occurs in Lord Melville's correspondence, and though Melville's visit to Scotland, where he opened the Parliament on 15th April 1690, in part accounts for this, it appears highly probable that another reason was the abatement of their intimacy. This letter shows the anxiety of Stair that William should have come himself to open the Parliament, but although the meeting had been several times adjourned for that purpose, the pressure of English affairs and

[1] Leven and Melville Papers, p. 379.

the more urgent necessity for his presence in Ireland prevented his coming.[1] "My Lord," Stair writes on 30th January, "most men heir ar now come to believe that the King will come to the Parliament, thogh not so soon as the first of March, but some time in that month. There must then be a proclamation for that purpose, and considering the povertie of this nation at this time I think it wer very convenient that therein the Sumptuary Act should be peremptorilie enjoyned, and that the King would cause those of his household observe it, and recomend it to others that come with him, and I conceive it will not be unacceptable to him. If it be not all her will vye with the English, and it will cost more then the subsidie the King will require. Ross and Skelmorlie are gone west, and have carried great quantities of their scandalous Pasquil against the King and his servants. There was a second edition printing heir by one Reid, but it is sezed on, and he in prisone; an answer to it were very fitt. I hear Skelmorlie is to cause a new election in the shire of Ayr; I know not how, but I guess he will doe it upon his call as Commissioner. It is trew the Commissioner of a former Parliament may caus an electione be made for a subsequent Parliament, but ther is no such warrant for a current Parliament, which, having no present Statut, must be by the ancient common weal by the Court of the Sheriff, which is done in my electione, wherein wer thirty-six for me to nynten for Rowallan, not in a separat meeting, bot all having voted in on body. The Club men went apairt, and gave a vote for Rowallan. There was no formality wanting in my election, which on my own accompt I would not have wished, becaus it heightens animosity of thes men against me; bot on the public accompt ther was much want of thes could balance the long speeches of the Club, for which it was thoght fitt that Fountainhall suld also be chosen for Hadington, which is not lyk to hold. I find by the common opinion heir that if

[1] See Melville's Speech to the Parliament, Act. Parl. ix. App. p. 38.

the King use the English service heir it will give great discontent. If some of the English Presbiterian ministers were to cum doune with him they might have great influence on our ministers heir. I wrytt freely to your Lordship what falls in my thoght thogh you never wrytt a word in particular to me. Be all means bring Mr. Carstaires downe with you, whois prudence may be of much use.—My dear Lord, adieu."[1]

The Scotch Parliament in its first session of 1690 did important work. William proved in statesmanship, as in generalship, a leader who, if he seldom won a battle, never lost a campaign. The edge was taken off the Club's opposition by its demands, so far as reasonable, being conceded.[2] The right of Parliament to appoint committees on special subjects was acknowledged. The Committee of the Articles, which, though its services to legislation in earlier times cannot be denied, and in an altered shape it might form a safeguard against the slipshod legislation of the present day, had become in Scotland a tool in the hands of tyrannical Governments, was abolished.[3] In its place separate Committees were appointed for controverted elections, the settlement of the Church (of which Stair was a member), supply, and fines and forfeitures.[4] It was also declared that while there should still be a Committee to consider all motions and overtures brought into the house, consisting of an equal number of each Estate, the Estates were to have full power to treat, vote, and conclude upon any matter they pleased without referring it to this Committee. Some of the Officers of State were still to be members of all Committees, but without the right to vote. An addition of twenty-six members was made to the representation of the counties. The Act of Supremacy of Charles II., by which the King had been declared supreme over all persons and in all causes ecclesiastical, was rescinded[5] as inconsistent with the form of Church government

[1] Leven and Melville Papers, p. 387.
[2] Laing, ii. 215.
[3] 1690, c. 3, Act. Parl. ix. 113.
[4] Act. Parl. ix. 114.
[5] 1690, c. 1, Act. Parl. ix. 111.

now desired. The Presbyterian ministers, who had been expelled from their churches since 1st January 1661, were restored.[1] The Westminster Confession was solemnly read word by word in presence of the Estates, and its approval voted, but no test was imposed, except upon the Professors of Universities.[2] The Covenant, which had been the watchword of so much strife, was not re-enacted, and the severe laws against conventicles of the preceding reign were repealed.

But the form of Church government was not yet settled, and much anxious care on the part of the Committee and the personal supervision of William was necessary before that thorny point could be adjusted on a moderate basis. The result of the deliberations of the Committee were two Acts, by the first of which the Confession of Faith was ratified, and Presbyterian Church government by Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies re-established.[3] The details were wisely left to a General Assembly, which was appointed to be held in Edinburgh on the third of October.[4]

The second Act,[5] passed at a later period of the session, regulated Patronage on the footing that the right to appoint ministers should be vested in the heritors and elders of each congregation, who were to propose the minister selected to the whole congregation, which might appeal to the Presbytery if they disapproved for reasons assigned. The patrons were, however, to be compensated by a small payment of 600 merks from the heritors, and although Patronage was nominally abolished by the Act, this provision not having been taken advantage of, it was restored in the reign of Queen Anne,[6] and

[1] 1690, c. 2, Act. Parl. ix. 111. [2] Act. Parl. ix. 164.

[3] 1690, c. 5, Act. Parl. ix. 133. [4] 1690, c. 5, Act. Parl. ix. 134.

[5] 1690, c. 23, Act. Parl. ix. 196, 19th July 1690.

[6] 10 Anne, c. 12, declared that it should be lawful to all patrons who had not exercised renunciation under the Act of William to present as formerly. But only four parishes, Calder, Old and New Monkland, and Strathblane, bought up the right.

still continued to vex the Church with divisions and secessions. The right of teinds not heritably disponed to the proprietors was declared to belong to the patrons, under burden of the minister's stipend, and an obligation to sell to each heritor the teinds of his lands so acquired at six years' purchase.

A Commission for the Visitation of the Universities, of which Stair, the old Glasgow Regent, was naturally one, was nominated in this Parliament.[1] It is a striking circumstance that almost all the varied experience of his earlier years found in after life an opportunity for its exercise. It was his good fortune to realize the hopeful, but not always true saying of the poet, that our youthful wishes find their fulfilment in old age.[2] As now his knowledge of University management was serviceable, so his military training enabled him to take a knowing part in determining what forces should be sent to and kept in Scotland by the new Government; while the diplomatic skill he had gained in the negotiations with Charles had an ample field in the difficult conduct of Parliamentary business.

The minor Acts of this Parliament were not of much consequence. The only ones worthy of notice were that which improved the law as to the sale of bankrupts' lands, allowing it to take place without the consent of the debtor;[3] the Act which declared the concealment of pregnancy murder;[4] and the Acts regulating confirmation of testaments[5] and the removing of tenants.[6] In the beginning of 1691 the Master of Stair, who had accompanied William in his campaign in Flanders, was appointed Joint Secretary for Scotland, along with Lord Melville, and towards the close of the year that nobleman resigned his secretaryship, and the Master remained as sole Secretary and virtual Prime Minister for Scotland. The cause

[1] 1690, c. 17, Act. Parl. ix. 163.

[2] Was man in der Jugend wünscht hat man im Alter die Fülle.—Goethe, *Wahrheit und Dichtung.*

[3] 1690, c. 20, Act. Parl. ix. 195.

[4] 1690, c. 21, Act. Parl. ix. 195.

[5] 1690, c. 26, Act. Parl. ix. 198.

[6] 1690, c. 39, Act. Parl. ix. 198.

of this change in the Scotch administration has been much canvassed, and never fully accounted for. Burnet[1] gives as the reason, the displeasure of William with Melville for sanctioning the Act by which the supremacy of the King in matters ecclesiastical was taken away, and that abolishing the rights of patrons, both of which, he says, were contrary to the King's instructions. But it has been successfully shown[2] that although the King in his remarks[3] on the Act for settling the Church Government expressed his disinclination to assent to these measures, he did not in the more explicit and authoritative though earlier Instructions[4] forbid Melville from allowing them if necessary; and Melville in his Vindication[5] forcibly pleads that the state of parties in Scotland, and of affairs abroad, rendered them necessary. Lord Macaulay,[6] on the other hand, has ascribed Melville's removal from office to his not "obtaining for the Episcopalians in Scotland an indulgence similar to that which Dissenters enjoyed in England," in order to give additional colour to his portrait of William as the champion of toleration. That William exerted the pressure of a strong will in favour of a policy of toleration, cannot be doubted; but although Melville's conduct in this matter may have been made a cause of

[1] *History of his Own Times*, ii. 62.

[2] Leven and Melville Papers, *Preface*, xxviii.

[3] Even in the letter transmitting the Remarques, William says, "However, Wee leave you some latitude, which Wee wish you may use with as much caution as you can, and in the way will tend most to our service."—Leven and Melville Papers, p. 436.

[4] See the Instructions of 25th Feb. 1690, Leven and Melville Papers, p. 414.

[5] See this Vindication, in Leven and Melville Papers, *Preface*, xxiv. *et seq.*

[6] *History*, iv. 186. Laing's explanation is that Melville was sacrificed to please the Episcopalians (*History*, ii. 219), which is also the view of Ralph (*History*, pp. 212, 332), and of Mr. Leslie Melville, who however says, "the point is one of some interest, but I confess my inability to clear it up. Upon the whole, Ralph's solution appears to me the most plausible."—Leven and Melville Papers, *Preface*, xxviii.

complaint against him, a simpler explanation will perhaps suffice for the placing of Sir John Dalrymple instead of Melville at the head of the Scotch government. The King was a shrewd judge of ability, and of what was required by the necessities of state. A firm hand and an able head were requisite at this juncture; and the moderate talents combined with honesty of purpose which Melville possessed, could not compensate for the want of these.

Although the Club had been discomfited by the discovery of Montgomery's intrigue with James II. in 1690, and the prudent concessions of William, the state of affairs in Scotland was far from settled in 1691. The Jacobite plots still continued; the Highlanders in the northern counties were not merely ready to rise—they had never yet owned allegiance to William. With the view of strengthening the Government, Stair proposed that the militia, which had been embodied by Lauderdale in 1669 to the number of 22,000 men, should be again raised.[1] The proposal, however, met with much opposition, and when the proclamation calling it out was discussed in the Privy Council, the ten members present were equally divided. Stair, the Earls of Morton and Forfar, Lords Belhaven and Stevenson, were for it; Lords Cardross and Ruthven, the Justice-Clerk, Sir John Lauder of Fountainhall, and the Earl of Craufurd, against it. A curious letter from the last of these noblemen, one of the least trustworthy of the Scotch statesmen of that period, who was steadily bent on undermining the influence of the Dalrymple family, to Carstairs, gives us a specimen of Stair's capacity for political management. He prevailed on four of the dissentients to sign the proclamation, failing only to convince Craufurd himself. It was thus he argued :—"My Lord Cardross," says he, "I know where your scruple lies. By the privilege of the Mint you are exempted from attending the King's host, and cannot be forced to it but by consent;

[1] Laing, ii. 55. See 1663, c. 26, and 1669, c. 2.

and are unwilling to wrong your successors in their rights; besides, your modesty prompts you to decline being Colonel to the regiment in Edinburgh, which a provost, if he were once chosen, may probably claim. Therefore you may cause mark it in the minute, that your signing the proclamation is no homologation of your acceptance of that trust, nor yet a parting with your privilege in the Mint, before which my Lord was prevailed on to sign the proclamation." The same wise man then addressed my Lord Ruthven in these terms:—"By your temper your lordship is not willful, nor are you commonly wedded to your own opinion; and as Abraham by his pleading for Sodom would have prevailed if there had been ten righteous in the city; so it was hoped that for a few ill men in the northern shires he would not reject the western, southern, and inland counties, who would be such a defence to the nation in the case of an invasion; upon which that honest nobleman concurred. The discourse was then to the Lord Justice-Clerk. That his lordship had been long sick, and it would be understood pecvishness if he were further dissentient, upon which his lordship likewise complied. My Lord Fountainhall was then told that being no soldier, it was expected he would not be tenacious, and that as he was a notable country man, and tender of putting the country to any increasing charge, his Lordship should be grateful, and whatsoever money was saved of the forty days' loan should go into the payment of the current cess. Upon which his lordship was likewise proselyted."[1]

Although the proclamation was issued, the militia was not at this time called out—the fear of invasion having become less imminent; and Queen Mary, who then presided over the Government during the absence of her husband, shortly after sent a letter ordering its discharge.

The tact or policy of Stair in this business is an example of what his opponents called cunning; and it must be admitted

[1] Craufurd to Carstairs, 16th June 1691.—Carstairs State Papers, 144.

that the kind of ability, by which the politician or diplomatist takes men as they are, and acts upon them by the different motives to which they are subject, is one apt to degenerate into cunning, and which requires its possessor to be on his guard against himself, to preserve the honesty of his character. Without some share of it, however, a man can scarcely take an effective part in public affairs since force has given place to persuasion in the government of men.

Stair had now reached the summit of his prosperity. He was tasting with the intense pleasure which only a restored exile feels the sweets of home. He saw the triumph of the principles for which he had suffered. The friend of the King, he himself held the highest judicial, and his eldest son the highest political, office in his native country. His other sons were provided for in the public service, and had proved themselves worthy of the offices they held. His grandson, whose education he had watched, was already beginning to display the talents which were to add a new lustre to the name of Stair. Though he had many enemies, he might view their attacks with unconcern, for they were the fruit of malevolence and disappointed ambition. He might reasonably look forward to some years of useful activity, and then to quit the scene of his labours with a name posterity would hold in honour.

> "But human promise, O how short of shine!
> How topple down the crags of hope we rear!"

His closing years were destined to be clouded by a severe private sorrow,—the death of his wife, and by the great crime which sullied the fame of William, disgraced the Master of Stair, and has cast a shade over his own character—the Massacre of Glencoe.

CHAPTER XII.

1692-1695.

Death of Lady Stair—Her reputed Witchcraft—Belief in Witchcraft in 17th Century—Why attributed to Lady Stair—Her Character—Massacre of Glencoe—Stair's connexion with it—Attacks upon the Court of Session, and Stair as President—How far well founded—Measures in Parliament for Reform of Court of Session—Charge against Stair of favouring his sons as advocates not well founded—The Peats—Acts of Sederunt of Court of Session during Stair's second Presidency—Publication, anonymously, of *The Vindication of the Divine Perfections*—Summary and Character of this Work—25th November 1695, Death of Stair—His Personal Appearance—Macaulay's false Character of him—Estimates of Contemporaries—His true Character—Comparison and Contrast between him and Lord Bacon—His Descendants; the Master of Stair; Sir James Dalrymple of Borthwick; Sir Hew Dalrymple of North Berwick; Dr. Thomas Dalrymple; Sir David Dalrymple of Hailes; The Field-Marshal and Second Earl Stair; Lord Hailes—His character reflected in them—Greater than any of his descendants—Chief Founder of Law of Scotland.

Lady Stair died in 1692. She had been the faithful companion during all but fifty years of the mingled prosperity and adversity, of the manhood and old age, of her husband. Her reputed witchcraft has been already alluded to in connexion with her daughter Janet's ill-fated marriage, but deserves a further notice. The belief in witches, common to all classes at this period, is to the present age an astounding phenomenon; its disappearance must be reckoned one of the greatest indirect benefits science has conferred on humanity. Yet the progress of spiritualism shows that other ages are liable to similar delusions, though fortunately men can no longer express the strength of such beliefs in the blood of others.[1]

[1] France has the honour of having first prohibited prosecution for witchcraft. This was done by an edict of Louis xiv.—Voltaire, *Siècle de Louis* xiv., c. 29.

The crime was not cast out of our law till 1735 (9 Geo. ii. c. 5), but the last

It has been estimated that during the sixteenth and seventeenth centuries 200,000 persons were executed, mostly burnt, for witchcraft, in Europe. Germany furnished one-half of the victims, and England about 30,000. Of this number Scotland contributed a large proportion. "Scotland," writes, in 1647, Howell, afterwards historiographer of Charles II., "swarms with them now more than ever, and persons of good quality are executed daily." "No fewer than fourteen commissions for the trial of witches were granted for different parts of the country in one sederunt of the Court of Justiciary on the 7th of November 1661, a year which seems to have been unusually fertile in this sort of accusation."[1]

Like slavery, the virus of this superstition was transmitted to the young blood of the New World, and the witches of New England vied with those of Scotland in celebrity. Divines of the Reformed as well as of the Roman Church, University professors, statesmen, and lawyers, shared the popular belief. The divines urged the authority of Scripture, to which the lawyers added that of the statute-book.[2] Not to believe in witches was denounced as atheism.

notice of execution for it in England appears to have been in 1712 (see Parr's Works, iv. 11, quoted by Buckle, *History of Civilisation*, i. 364), and the last in Scotland is said to have been in 1697 (Hutchinson's *Essay on Witchcraft*, quoted in Cobbett's *State Trials*, vi. 654). There is, however, an account of the burning of a witch at Dornoch in 1727, in Burt's *Letters from the North of Scotland*, 2d ed., i. 233, but the authenticity of this may be doubted. Sir W. Scott, in his *Letters on Demonology and Witchcraft*, mentions "that in 1722 a Sheriff-depute of Sutherland, Captain David Ross of Littledear, took upon him, in flagrant violation of the then established rules of jurisdiction, to pronounce the last sentence of death for witchcraft which was ever passed in Scotland. The victim was an insane old woman belonging to the parish of Loth, who had so little idea of her situation as to rejoice at the sight of the fire which was destined to consume her. She had a daughter lame both of hands and feet, a circumstance attributed to the witch having been used to transform her into a pony, and get her shod by the devil." But this was an illegal proceeding, although Scott says no punishment was inflicted on the Sheriff for his excess of jurisdiction, and cruel abuse of the law.

[1] Hume's *Commentaries on the Law respecting Crimes*, i. 590.

[2] See Sir G. Mackenzie's chapter on Witchcraft in his *Criminal Law*, and

The second half of the seventeenth century was regarded as a time when this Satanic influence was poured forth in more than ordinary measure. Its literature teems with hideous details of what the devil and witches were supposed to do to men, and the cruel tortures and deaths men inflicted on supposed witches.

The Scotch race of witches was reputed to be unusually potent. While in other countries they were the devil's slaves, here he was their servant. Galloway, and the parish in which Stair lived, had been the scene of one of the most notorious apparitions—the devil of Glenluce.

The roots of this superstition may be traced back to Pagan times. That which is remarkable is, that the human mind was now beginning to awaken to the folly of the belief. Its advocates already argue on the defensive, and the more learned, of

Lord Hale's charge on a trial for witchcraft. "That there are such creatures as witches I make no doubt at all; for, first, the Scriptures have affirmed so much; secondly, the wisdom of all nations hath provided laws against such persons, which is an argument of their confidence of such a crime."—Cobbett's *State Trials*, vi. 699.

"Monstrous as the thing is, it is on record that in one instance at least, the case of Alison Balfour, the torture was not confined to the accused herself, but was applied in her presence to her husband, her son, and her daughter, a child of seven years old."—Hume's *Commentaries on the Law respecting Crimes*, i. 59.

"Our Scotch witch is a far more frightful being than her supernatural coadjutor on the south side of the Tweed. She sometimes seems to rise from her proper sphere of the witch, who is only the slave, into that of the sorcerer, who is master of the demon."—Burton, *Criminal Trials in Scotland*, i. 240, quoted by Buckle, *History of Civilisation*, iii. 37, where many other authorities are referred to. Of these one of the most remarkable is by a successor of Stair as a Professor of Philosophy in Glasgow, Mr. George Sinclair, who published in 1685 *Satan's Invisible World Discovered*, containing a "Choice Collection of Modern Relations proving evidently, against the atheists of this present age, that there are *Devils*, Spirits, Witches, and Apparitions, from authentic records and attestations of witnesses of undoubted veracity." "There is much witchery up and down our land," wrote Robert Baillie in the time of the Commonwealth; "the English be but too sparing to try it, but some they execute." Many other instructive notices on the subject are given in Chambers's *Domestic Annals of Scotland*.

whom Sir George Mackenzie is a sample, feel the necessity of compromise. It was openly attacked in 1691 in an elaborate work by Balthasar Bekker, entitled *The World Bewitched*, on the principles of the Cartesian philosophy; and even a century before, John Wier, a physician of Grave, had boldly denounced the demons who had taken possession, not of the wizards, but of their judges.[1]

The cause which led to its being attributed to Lady Stair was the envious jealousy which the vulgar mind feels with regard to the superiority and prosperity of its neighbours. "*If a woman*," observes Baron Hume, "*throve in the world more than her neighbours saw cause for, or perhaps wished*, or if she kept her health in a sickly season, or were not to be found at any time she was sought for, it behoved her, by the rules of this code, to be in company with the devil, and be one of his servants."[2] The rise of the Dalrymple family had been sudden and almost unprecedented. No Scotchman had, before Stair, risen so high by merit in a purely civil walk. Unwilling to admit its true cause, his adversaries sought for a supernatural one. Lady Stair had not only shared in it, but by the fortune she brought her husband might be deemed to have materially contributed to its foundation; nor is it improbable that, as many wives, she had spurred the ambition of her husband.

In the satires of the day she was described as the Witch of Endor. By the common people, with the rude familiarity for which in Scotland this class has sometimes been conspicuous, she was known as Aunty, and Dame Maggy or Maggie Ross. She had made, it was said, a paction with the Evil One, who enabled her to assume various shapes at will. Once she appeared in the form of a cat, which crossed the Duke of Hamilton's cushion as he sat in St. Giles's Cathedral:

[1] Motley, *United Netherlands*, iv. 528.

[2] Hume's *Commentaries on the Law respecting Crimes*, i. 590.

"Johnstoun, rejoice with your friend Ormistoun
And you, Sir William, and Duke Hamiltoun,
That the cat that crost the cushioun in the Church
Is dead, and left her kitelings in the lurch."[1]

On another occasion she promised the assistance of the devil to Sir Patrick Murray,[2] member of Parliament for Stranraer, if he voted as she wished, and redeemed her promise by directing his ball into the hole at golf. The misfortunes, as well as the fortune of her family, were ascribed to her influence. One daughter had ill-hap in marriage; another was a witch, like herself; her grandson had killed his brother.

"Its not Staires bairnes alone Nick doth infest,
His children's children likewise are possest."

Her own death was celebrated in several coarse epitaphs, prophesying the downfall of the Dalrymple family, but this prophecy has not been fulfilled.[3]

The ability of Lady Stair was shown in a favourite sphere of a woman's activity, the marriage of her daughters,

[1] Upon the lang wished for and tymely death of the Right Honourable the Lady Stair.—Maidment, *Scotch Pasquils*, p. 192.

"So pouse in majestie, from eloath of State
St. Geills saw thrown by Huffie, Duke of late."—*Ibid.* p. 187.

[2] Sir Patriek Murray was the representative of Stranraer in Parliament, put in there by Lady Stair, to whom she promised Old Nick's assistanee if he voted her way in Parliament, and accordingly she ordered his ball while at Golfe.—R. M. Robert Mylne's note to Pasquil on the Stair family; Maidment, 184. This is also referred to, p. 181:—

"He (*i.e.* Stair) *jure postliminii* did transub
Himself to ball, the Parliament to club,
Which will him holl when right teased at ane blow,
Or else Sir Patrick will be the shinnie goe."

[3] There is a very singular reference to the witeheraft of the Dalrymple family in Pepys's Correspondence. Dr. Hiekes writes to Pepys, June 19, 1700, "As for this subject, I had a very tragieal but authentie story told me by the Duke of Lauderdale, which happened in the family of Sir John (James) Dalrymple, Lord of Stair, and then Lord President, as they eall the Lord Chief Justiee in Seotland. His Graee had no sooner told it me, but my Lord President eoming into the room, he desired my lord to tell it me himself, which, altering his eountenanee, he did with a very melancholiek air, but it is so long sinee, I dare not trust my memory with relating the

success in which is apt to turn against her those who have tried and failed. Besides Lady Dunbar, her daughter Elizabeth was wife of Lord Cathcart; Sarah, of Lord Crichton, afterwards Earl of Dumfries; Isobel, of Sir David Cunningham of Milncraig. Her wit must have been ready, if we may judge from a single specimen which has survived. Meeting Claverhouse, probably when executing his commission in Galloway, he began inveighing against John Knox. "There is not, after all," she said, "so much difference between you and him, only he gained his point by 'clavers,' you gain yours by 'knocks.'"[1] To the opinions of the Reformer she appears to have adhered with even more tenacity than Stair himself. Her withdrawal from the ministrations of the Episcopal curate at the parish church, we have seen was one of the causes of Stair's exile. This, no doubt, contributed to the hatred with which she was pursued when living, and in her grave by the Jacobite satirists. Yet her character, even as drawn by these implacable enemies, rises before us out of the mist of the past, as that of a woman of strong purpose and much spirit, well able to bear either good or evil fortune.

Although the tragic page of Scotch history on which is inscribed the name of Glencoe belongs more to the life of his son than to that of Stair, and is too well known to bear repetition of its details, it cannot here be passed over. After the Revolution, not only was the union with England, though considered pressing, still delayed, but Scotland itself was a divided nation. The Celtic race of the North and West Highlands were "aliens

particulars of it, though it was a memorable story; but if my Lord Reay would be pleased to make enquiries of the present heir of the family, he would find it a story of great authority, and worthy of being written by his excellent pen." On August 2d, Pepys writes to Dr. Hickes, "I shall very soon repeat my demands to my Lord Reay touching the Lord President Stair's story," but the further letters of the correspondence are unluckily not preserved.

[1] Murray's *Literary History of Galloway*, 155.

in blood, language, and religion" from their fellow-countrymen of the East, West, and South Lowlands. In many homes of the west the recollection of the Highland Host was still fresh. The simple custom of obedience to the patriarchal chief was better understood in the Highlands than the rules of the feudal and the civil, or even of the moral law. Robbery at the command of the chief was no crime, killing no murder, lying in his service no vice. Disobedience to the chief was the gravest guilt a clansman could commit. How this was to be remedied was a problem for a statesman of those days as difficult as the settlement of Ireland has proved to those of our own. Then, as now, there were those who advocated a decided and severe policy as true wisdom. There is much ground for thinking that in this they judged rightly; the lawlessness of the Scotch, like that of the Irish Celts, was not likely to be curbed by half measures. But the breach of faith and wanton cruelty which accompanied the execution of this policy were grievous errors as well as heinous crimes.[1] The memory of Glencoe's bloody day impeded the settlement of Scotland throughout all William's reign, and was not forgotten in 1715 and 1745.

The plan devised by the Earl of Breadalbane, and assented to by the Master of Stair, was that the former should be intrusted with £20,000 to gain over the Highland chiefs, while a Proclamation[2] was issued that all who did not take the Oath of Allegiance before 1st January 1692 were to be held guilty of treason, and letters of fire and sword put in execution against

[1] "A new scheme was suggested by Lord Breadalbane, adopted by the Secretary (the Master of Stair), and assented to by the King, for cutting off all the Highland rebels who should not take the oaths to the new Government within the time prescribed by law. The mode of the execution was intended to be by what was called in Scotland letters of fire and sword, an inhuman but a legal weapon in that country against attainted rebels."—Sir John Dalrymple's *Memoirs*, i. 119.

[2] 27th August 1691. Papers illustrative of Condition of the Highlands. —Maitland Club, p. 35.

them. In furtherance of this plan a truce or cessation of hostilities had been arranged by Breadalbane with the chiefs, and Major-General Buchan and Sir George Barclay on behalf of James VII., and signed at Achalader on 30th June 1691, but it was only to endure till 1st of October.[1] Toward the end of December 1691 Macdonald of Glencoe came to Colonel Hill, Governor of Fortwilliam, at Inverlochy, and offered to take the oath, but was referred by him to Sir John Campbell of Ardkinglas, Sheriff of Argyleshire at Inverary, as the proper officer to receive it. Hill gave him a letter to Ardkinglas to take him in "as a lost sheep." Glencoe repaired to Inverary, and his oath was taken by Ardkinglas, but, through several untoward circumstances, not till the sixth day after the time prescribed in the Proclamation. The deposition of Glencoe was sent by Ardkinglas, along with Colonel Hill's letter, to the Privy Council in Edinburgh, but the Clerks of the Council refused to accept it, "because done after the day appointed by the proclamation."[2] The papers seem afterwards to have been received, but that which contained Glencoe's oath was deleted, and none of them are now to be found amongst the Acts or Warrants of the Privy Council.[3] The Commissioners appointed by William in 1695 to inquire into the massacre, reported on this deletion that Colin Campbell, Sheriff-Clerk of Argyle, and Mr. John Campbell, Writer to the Signet, "went, as they depone, to Lord Aberuchill, then a privy councillor, and desired him to take the advice of privy councillors about it, and accordingly they affirm *that Aberuchill said he had spoke to several councillors, and partly (? particularly) to the Lord Stair,* and that it was their opinion that the foresaid certificate could not be received without a warrant from the King, and that it would neither be safe to Ardkinglas nor profitable

[1] See Papers illustrative of Condition of Highlands.—Maitland Club.

[2] Report of Glencoe Commission, 20th June 1695.

[3] This has been ascertained by an examination of these, in which I have been aided, as on other occasions, by the kindness of Mr. Dickson, the Historical Curator, Register House, Edinburgh.

to Glencoe to give in the certificate to the Clerk of the Council. *And this the Lord Aberuehill confirms by his deposition, but doth not name therein the Lord Stair.* And Colin Campbell, the Sheriff-Clerk, does further depone that with the knowledge of Lord Aberuchill, Mr. John Campbell, and Mr. David Moncrieff, Clerk to the Council, he did by himself or his servant, score or delete the foresaid certificate, as it now stands scored, as to Glencoe's taking the oath of allegiance, and that he gave it in so scored and obliterate to the said Mr. David Moncrieff, Clerk to the Council, who took it in as it is now produced. But it doth not appear by all these depositions that the matter was brought to the Council board that the Council's pleasure might be known upon it, though it seems to have been intended by Ardkinglass, who both wrote himself and sent Colonel Hill's letter to make Glencoe aware, and desired expressly to know the Council's pleasure."

Were we to weigh these depositions by the rules of legal evidence, they would be insufficient to prove that Stair took any part in this business. The hearsay of the two Campbells would be held inadmissible, and even, if admitted, as it is not corroborated by the better evidence of Lord Aberuchill himself, it could not be relied on. But the Court of History is not bound by such rules; and although it is impossible to pronounce a positive opinion upon the point, it appears not improbable that Stair was one of the Privy Councillors who advised that Glencoe's oath should not be received, for he was one of the Committee of the Privy Council, by whom matters relating to the Proclamation and Indemnity were to be considered.[1] The fact that it had been tendered, and it would appear the whole papers on the subject, were brought to the knowledge of the Court at London,[2] and whatever doubt may hang over Stair's conduct, there can be none as to that of his son. The Secretary had yielded with reluctance to the scheme for buying the

[1] MS. Privy Council Record, January 1692. [2] Report of Commission.

chiefs. On 2d December he had written to Breadalbane :— "God knows whether the £12,000 sterling had been better employed to settle the Highlands or to ravage them, but since we will make them desperate, I think we should root them out before they can get that help they depend on."[1] And on the following day :—"By the next I expect to hear either that these people are come to your hand, or else your scheme for mauling them, for it will not delay. . . . I am not changed as to the expediency of doing things by the easiest means and at leisure, but the madness of these people and their ungratefulness to you makes me plainly see there is no reckoning upon them ; but *delenda est Carthago.* Yet who have accepted and do take the oaths will be safe, but deserve no kindness."[2]

To Sir Thomas Livingstone, the Commander of the Forces, he wrote on 7th January, "I assure you your power shall be full enough, and I hope the soldiers will not trouble the Government with prisoners ;"[3] on the 9th, when he seems already to have heard a rumour that Glencoe had come in : "For my part I could have wished that the Macdonalds had not divided, and I am sorry that Keppoch and MacIan of Glencoe are safe ;"[4] and on the 11th, "I have no great kindness to Keppoch nor to Glencoe, and its well that people are in

[1] Sir John Dalrymple's *Memoirs*, ii. 265. In the same letter he says :— "I think the Clan Donell must be rooted out, and Loehiel." See also his earlier letters of June 25 and August 24, 1691.—*Ibid.* ii. 260.

[2] Sir John Dalrymple's *Memoirs*, ii. 216. See also his letters to Breadalbane, of 27th October and 3d November 1691, in Appendix to Burton's *History of Scotland since Revolution*, i. 525.

[3] In a part of this letter, not quoted by the Commission, the Master mentions "that they had an account that Glencoe had taken the oaths at Inverary."—*Gallienus Redivivus*, p. 114. After the massacre the Master wrote to Hill, 5th March 1692, "I have the aecount both from you and your Lieutenant-Colonell of the affair of Glenco. There is much talk of it here that they are murdered in their beds after they had taken the allegiance ; for the last, I know nothing of it." He adds, "All I regrete is that any of the sect got away."—Papers illustrative of Condition of the Highlands, p. 75.

[4] Report of Commission.

mercy. . . . My Lord Argyle tells me that Glencoe hath not taken the oath, at which I rejoice. It is a great work of charity to be exact in rooting out that damnable sect, the worst of the Highlands."[1] On the 11th and 16th the King's instructions were issued to Livingstone, in language which there is little doubt is that of the Master of Stair:[2]—"If Mac Ian of Glencoe and that tribe can be well separated from the rest, it will be proper vindication of the public justice to extirpate that set of thieves;" but these instructions were

[1] Report of Commission.

[2] The first instructions were on 11th January. The whole of the additional instruction of 16th January is as follows:—"WILLIAM R. 1. The copy of that paper given by Macdonald of Auchtera to you hath been shown to us. We did formerly grant passes to Buchan and Cameron, and we do authorise and allow you to grant passes to them, and for ten servants to each of them to come freely and safe to Leith, and from that to be transported to the Netherlands before the day of March next, to go from thence where they please without any stop or trouble.

"2. We do allow you to receive the submissions of Glengarry and those with him, upon their taking the oath of allegiance, and delivering up the house of Invergarry; to be safe as to their lives, but as to their estates they must depend upon our mercy.

"3. In case you find that the house of Invergarry cannot probably be taken in this season of the year with the artillery and other provisions you can bring there, in that case we leave it to your discretion to give Glengarry the assurance of entire indemnity for life and fortune upon delivering the house and arms, and taking the oath of allegiance. In this you are allowed to act as you find the circumstances of the affair do require; but it were much better that those who have not taken the benefit of an indemnity in the terms and within the diet proposed by our proclamation they should be obliged to render upon mercy. And the taking of the oath of allegiance is indispensable, others having already done it.

"4. If M'Ian of Glencoe and that trybe can be well separated from the rest it will be proper vindication of the public justice to extirpate that set of thieves. The double of these instructions is only communicated to Colonel Hill. W. REX."—Instructions from the King to Sir Thomas Livingstone, Papers illustrative of the Condition of the Highlands, p. 65; and the Instructions to Colonel Hill, Culloden Papers, p. 19. Of the same date the Master of Stair wrote to Livingstone:—"I send you the King's Instructions, super and subscribed by himself. I am confident you will see there are full powers given you in very plain terms, and yet the methods left very much to your own discretion."—Papers illustrative of the Condition of the Highlands, p. 61.

subscribed and superscribed by William himself. Burnet pleads on his behalf that he did not read the order which he twice signed. Macaulay[1] urges that "these words naturally bear a sense perfectly innocent, and would, but for the terrible event which followed, have been universally understood in that sense."

It is impossible to accept either of these apologies. The King, who does not read an order authorizing death, is scarcely less culpable than one who issues knowingly such an order unjustly. But the fact is that William had been constantly consulted on the measures for reducing the Highlands. These were by no means of the small importance sometimes represented, for on them depended the peace of the kingdom and the security of his reign. The best interpretation of the words of the order is that which the officer to whom they were addressed put upon them. What followed in February[2] was the extermination of the men of Glencoe, so far as the fierce soldiers to whom its execution was intrusted were able to effect it. From the 1st to 13th February Campbell of Glenlyon and his troop of 120 soldiers, who were despatched on this service by Colonel Hill, lived as guests in the houses of Macdonald and his clan. On the 13th they murdered their hosts under circumstances of singular atrocity.[3] By two parties the massacre was naturally

[1] *History*, iv. 205.

[2] 13th February 1692.

[3] More telling than any picturesque account such as Macaulay has given is the plain narrative of the Commission of 1695 :—"The slaughter of the Glencoe men was in this manner, viz., John and Alexander Macdonald, sons to the deceased Glenco, depone that Glengary's house being reduced, the forces were called baek to the south, and Glenlyon, a captain of the Earl of Argyle's regiment, with Lieutenant Lindsay and Ensign Lindsay, and six score soldiers returned to Glenco about the 1st of February 1692, where, at their entry, the elder brother John met them with about twenty men, and demanded the reason of their coming; and Lieutenant Lindsay showed him his order for quartering them under Colonel Hill's hand, and gave assurance that they were only come to quarter, whereupon they were billeted in the country, and had kind entertainment, living familiarly with the people until the 13th of February. And Alexander further depones that Glenlyon, being his wife's uncle, came almost every day and took his morning drink at his house, and that the very night before the slaughter Glenlyon did play at

seized upon as a good opportunity to attack their opponents. The Jacobites used it as a means to discredit the government of William; the adversaries of the Dalrymples as a means to procure the removal of Stair and his son from their offices. It was speedily brought before the European public by the *Paris Gazette* of 7th April, and in the same month a letter was published from a gentleman in Scotland to his friend in London

cards in his own quarters with both brothers. And John depones that old Glenco, his father, had invited Glenlyon, Lieutenant Lindsay, and Ensign Lindsay to dine with him upon the very day the slaughter happened. But on the 13th of February, being Saturday, about four or five in the morning, Lieutenant Lindsay, with a party of the foresaid soldiers, came to old Glenco's house, where, having called in a friendly manner, and got in, they shot the father dead with several shots as he was rising out of his bed; and the mother, having got up and put on her clothes, the soldiers stripped her naked and drew the rings off her fingers with their teeth, as likewise they killed one man more and wounded another grievously at the same place; and this relation they say they had from their mother, and is confirmed by the deposition of Archibald Macdonald, indweller in Glenco, who further depones, That Glenco was shot behind his back with two shots, one through the head and another through the body. . . . And the said John, Alexander, and Archibald Macdonald do all depone that the same morning there was one Sergeant Barber with a party at Auchnaion, and that Auchintriaten being there in his brother's house with eight more sitting about the fire, the soldiers discharged upon them about eighteen shots, which killed Auchintriaten and four more, but the other four, whereof some were wounded, falling down as dead, Sergeant Barber laid hold of Auchintriaten's brother, one of the four, and asked him if he were alive? He answered that he was, and that he desired to die without rather than within. Barber said that for his meat that he had eaten he would do him the favour to kill him without; but when the man was brought out and soldiers brought up to shoot him, he, having his plaid loose, flung it over their faces, and so escaped; and the other three broke through the back of the house and escaped. And at Inveriggen, where Glenlyon was quartered, the soldiers took other nine men, and did bind them hand and foot, and killed them one by one with shot; and when Glenlyon inclined to save a young man of about twenty years of age, one Captain Drummond came up and asked how he came to be saved in respect of the orders that were given, and shot him dead. And another young boy about thirteen years ran to Glenlyon to be saved; he was likewise shot dead. And in the same town there was a woman, and a boy about four or five years of age killed. And at Auchnaion there was also a child missed, and nothing found of him but the hand. There were likewise several killed at other places, whereof one was an old man about eighty years of age."—Report of Commission.

describing it in detail. In 1695 it was again revived in a notorious pamphlet, in which Gallienus, the son of Valerian, a weak and wicked Roman Emperor, was held up as the prototype of William.[1]

The Scotch Parliament of 1693 had been with difficulty prevented from accusing Stair and the Master by the Secretary Johnston,[2] who, while he was obliged to follow the orders he received on the subject, appears to have secretly encouraged the opposition. He had already begun a plot to supplant the Master, and become sole secretary himself. No Parliament sat in 1694, but as soon as it reassembled in 1695, under the Marquis of Tweeddale as Commissioner, one of the first demands made by the newly appointed Committee[3] for security of the

[1] *Gallienus Redivivus*—the motto affixed is the letter of Gallienus to one of his ministers in Illyricum :—"Non mihi satisfacies si tantum armatos occideris quos et fors belli interimere potuisset. Puniendus est omnis sexus virilis si et senes atque impuberes sine reprehensione nostrâ occidi possent. Occidendus est quicumque male voluit. Occidendus est quicumque male dicit contra me, contraValerianum filium, contra tot principum patrem et fratrem. Ingeuuus factus est imperator. Lacera occide concide: animum meum intelligere potes mea mente irascere *qui haec manu mea scripsi.*"—Quoted by Mr. Paget, *New Examen*, p. 135.

[2] Secretary Johnston to Carstaires, 18th April 1693. This letter, however, appears to refer to the causes of complaint.—Carstaires, *State Papers*, 153, 4th May 1693; *ibid.* 159.

[3] In a Memorial of some Affairs of State, 1695, the origin of this Committee is thus explained :—"The first step of bussines being the choyse of a Committee, it was conserted with the managers (*i.e.* the managers of the Opposition in Parliament) that there should be a Committee for the Security of the Kingdome, consisting of nyne of every estate, twenty-seven in all, and the persons were also conserted soe that above two to one should be of the hotest sort, who might carry everything to ther pleasure in that Committee, and thes conserted lists carryed with some alteration in the nobility, and without any alteration at all in the Commissioners for shyres and burghs. And all matters of any moment were designed, and actually have been remitted to that Committee, to the great retardment of the publick interest, and the raising and fomenting of heats and divisions. At the first meeting of this Committee the Duke of Queensberry, the Earle of Argyle, Master Lothian and Leven did attend, but it was conserted that the Earle of Crawfurd should be chosen preses of that great Committee for preparing all the public business of the nation, a man who wes not so much as upon his Mattie's Privy Councell, and who was known to be on the top of

kingdom was, that an inquiry should be made in the matter of Glencoe. A Parliamentary inquiry was only averted by the nomination of a Royal Commission.[1] The Commission consisted of Tweeddale, the Earl of Annandale, Lord John Murray, afterwards Duke of Athole, Sir James Stewart Lord Advocate, Adam Cockburn Lord Justice-Clerk, Archibald Hope of Rankeillor, Sir William Hamilton Lord Whitelaw, Judges of the Court of Session, James Ogilvy King's Solicitor, and Adam Drummond of Megginch. One at least of the Commissioners, Hamilton, was the bitter enemy of the Dalrymples, and the efforts of the Commission were directed to whitewash the King, and incriminate the Master of Stair.[2] Although this renders the conclusions of the Commission doubtful, in so far as they distribute the blame amongst the persons concerned, the careful scrutiny of the whole evidence by historians in after times, and by keen partisans of all sides, has established the accuracy of their report as regards matter of fact. Motions were repeatedly made that their report should be laid before Parliament, and at last, though with evident reluctance, this was done on 24th June 1695.

The result at which they arrived was, "1. That it was a great wrong that Glenco's case, and diligence as to his taking the oath of allegiance with Ardkinglas's certificate, and the letters of Ardkinglas and Colonel Hill were not presented to

all violent designs. . . . And since that time Sir William Hamilton of Whytlaw, a very forward person, a Commissioner for a burgh, hes been almost constantly chosen preses."—Papers illustrative of the Condition of the Highlands, p. 153.

[1] Commissio pro Inquirendo de Cæde de Glencoe, 29th April 1695.—Papers illustrative of Condition of Highlands, p. 97.

[2] "This Commission was granted by his Majesty of designe to satisfie the world that the warrand given by the King was legal and just, and that the error lay in the untimely execution of it. But least the King might have had a truer view of the bussines, thes who obtained the Commission keept it private from Secretary Stair, and it was still keeped private till that very day that the king's going beyond sea was knowen at Edinburgh, then it wes exposed."—*Memorial of some Affairs of State*, Papers illustrative of Condition of Highlands, p. 154.

the Privy Concell, and that those who advised the not presenting thereof were in the wrong, and seem to have had a malitious design against Glencoe; and that it was a further wrong that the certificate as to Glencoes taking the oath of allegiance was delete and obliterate after it came to Edinburgh. 2. That it appears to have been known at London, and particularly to the Master of Stair, in the month of January 1692, that Glenco had taken the oath of allegiance, though after the day prefixed. 3. That there was nothing in the Kings instructions to warrant the committing of the foresaid slaughter, even as to the thing itself, and far less as to the manner of it. 4. That Secretary Stairs letters, especially that of the 11th and that of the 16th January, of the same date with the Kings additional instructions, and of the 30th of the same month, were no ways warranted by, but quite exceeded, the Kings personal instructions."

On the same day the Parliament voted unanimously that the execution of the Glencoe men was without warrant in the King's instructions, and, whether unanimously or not is not clear, that that execution was a murder. By subsequent votes it was carried that the Master of Stair's letters exceeded the King's instructions;[1] that Sir Thomas Livingstone, the Commander-in-chief, had reason to give the orders he did;[2] that Lieutenant-Colonel Hamilton was not clear of the slaughter;[3] that Major Duncanson, who was in Flanders, should be ordered home to be prosecuted as the King should think fit; that Glenlyon, Captain Drummond, Lieutenant Lindsay, Ensign Lundie, and Serjeant Barber, were actors in the slaughter of the Glencoe men, and that his Majesty should be addressed to send them home to be prosecuted. In the address, which was afterwards[4] laid before Parliament by the Committee, the Master

[1] Minutes, 26th June 1694. [2] *Ibid.* 28th June. [3] *Ibid.* 8th July.
[4] 10th July 1695; Papers illustrative of the Condition of the Highlands, p. 145.

of Stair was severely censured, but it was left to the King to deal with him as he pleased.[1]

Whatever opinion we may form of William's original complicity, there can be none that he condoned the guilt of his subordinates. Although the Master of Stair was deprived of office, he soon afterwards received a remission[2] from William, who, instead of prosecuting the officers as the Parliament recommended, promoted them.[3] An independent study of the case will probably lead the unbiassed student to the conclusions at which Mr. Paget comes in his careful monograph on this subject:—"We cannot doubt that William's signature was affixed to the order with full knowledge of the facts, and that his intention was to strike terror into the Highlanders by the extirpation of a clan too weak to offer any effectual resistance, but important enough to serve as a formidable example. Next come Breadalbane and the Master of Stair, between whom the scales balance so nicely that it is hard to say to which the larger share of execration is due. Livingstone, Hamilton, Duncanson, Drummond, Glenlyon, and his subalterns, must share amongst themselves the responsibility for the peculiar circumstances of treachery and breach of hospitality attendant upon the execution. For this we think neither William, Breadalbane, nor the Master of Stair can justly be held answerable." As to what concerns Stair himself, the non-presentment to the

[1] A defence of the Master, styled *Information for the Master of Stair*, written by his brother Hew, having been circulated amongst the members of Parliament, was voted false and calumnious, and ordered to be burnt. The whole proceedings afford a favourable specimen of the capacity of the Scotch Parliament for the conduct of business.—Papers illustrative of the Condition of the Highlands, p. 120. The substance of this defence is (1.) that the Master did not authorize the manner of the execution of the order; (2.) that he did not know Glencoe had taken the oath.

[2] See Scroll of Discharge to John, Viscount of Stair. Papers illustrative of the Condition of the Highlands, p. 149.

[3] "Colonel Hill becomes Sir John; Glenlyon when he reappears on the stage of history is a Colonel; Livingstone becomes Lord Teviot."—Paget's *Examen*, p. 145.

Privy Council of Glencoe's oath, this was certainly a remote link in the chain of causes which led to the massacre, but it was a link, and probably the safest language which can be used is that Parliament employed with regard to Hamilton, that he is not clear from the slaughter of the Glencoe men. It is fair, however, to observe that the Commission, no doubt on account of the insufficiency of the evidence, did not mention Stair by name as a party to the act of not presenting the papers to the Privy Council.

Glencoe, though the darkest, was not the only cloud which obscured the horizon when the sun of Stair began to set. The Court over which he presided was the subject of constant and vehement attacks. A disappointed suitor presented a charge against him to Parliament, the majority in which readily granted an inquiry; but when that inquiry was made by the Committee for the Security of the Kingdom, which included several of his personal enemies, nothing against him was proved.[1] The

[1] "The first publick attaque in Parliament was made upon the Viscount of Stair by a vile and evil person of noe credit or reputation in the world, who was prompted to offer a bill to the Parliament complaining of injustice done to him by the said Viscount of Stair, President of the Session; and this project was keept private till it was ready for execution. Upon a Saturday's night ther was a great meeting in a tavern of towards fourty members, when harangue was made that they should not divyde in their votes for the good of the nation. The Secretary Johnston was ther, but went away before the project was opened. The President of the Parliament and all the active members of that party in the Committee for Security stayed till the last, who held furth what a great injustice had been done by the President, and how much it tended to the union of the nation to punish the lyke; and it was concerted that a precognition should be taken before the Committee for Security. The bussines was brought in by surprize upon Monday morning, and a son of the Viscount of Stair, being a Member of the Parliament, having complained of the methods used in that matter, endeavoured to clear the business and assert his father's innocence. He was twice repremanded from the throne; and the assertion of the bill being bold and weill supported, it was with little difficulty agreed to be inquired into, but many thoght it hard that the inquiry should be remitted to the Committee for the Security of the Kingdome; but that being conserted and put to the vote whether elect a new committee or remitt, caryed remitt only by three votes, which may satisfie the world how equally the Parliament is poised, even as to number, when the influence of the persons chiefly trusted, and a previous

Bench, his enemies said, was filled with his creatures, the taint of corruption still clung to it, and a form of judicial vice, not unknown in other times, in other forms, the favour shown by judges to their relations and friends, was specially charged against its members, including Stair himself. Stair undoubtedly had a large share in the nomination of the Bench at the Revolution, but the new judges seem to have been the best that could have been chosen, and from the reports of one of them—Lord Fountainhall, the ablest lawyer then in Scotland—we see that they were far from subservient to Stair. A series of Acts, passed on the recommendation of the Committee for the Security of the Kingdom, however, show that there still existed abuses in the administration of justice requiring remedy, and which appear to justify Mr. Laing's opinion that "it is not sufficient to ascribe to political animosities the outcry of all parties against Stair as President."[1] Judicial purity is a plant of slow growth in a soil which has once been corrupt. Although Stair was in advance of his predecessors in this respect, the necessity for parliamentary reform in matters which might have been set right by the native vigour of the Court, proves that he was not free from reproach.

Thus the despatch of business, a subject peculiarly appropriate for regulation by the Court, had to be promoted by an Act of Parliament which required concluded causes, where the judge reporter considered the depositions to be clear on either side, to be summarily decided.[2]

consent, did cary so narrowly up a surpryse of the other syde. It is not fitt to reflect upon the procedure of that Committee, but this is certain, that they were very vigorous in the prosecution and inquiry at first, *untill the witnesses adduced to load the President did fully exculpat and clear him to the view of the world.* But since the procedure has been very heavy, and when they could not load the President in his old age and absence, his freinds could not move them to advance one step towards his exoneration and the punishment of his lybeller; but there are informations printed and published that doe sufficiently vindicate him in the eyes of the world."—Memoriall on State of Affairs, 1695; Papers illustrative of Condition of the Highlands, p. 157.

[1] Laing, ii. 126.

[2] 1693, c. 17, Act. Parl. ix. 282.

A practice which had given rise to much dissatisfaction, of modifying, or even altering, the terms of a judgment, after it had been delivered, was checked by the provision that all interlocutors should be signed immediately after the vote was taken, in the presence of the Judges, by the President.[1]

A regular weekly rotation of the judges in the Outer House was enforced, and it was declared that if a judge left his seat in the Outer House during his week, and came into the Inner House, the parties should be entitled to decline him if they suspected him of partiality.[2] This was directed against packing the Bench to secure a judgment in a particular case, flagrant instances of which had been known. It was also provided that advocates should sign the Minutes of Debate, which at that time were reduced to writing by the clerks, a custom which must have given those officers useful occupation, and may have had the effect of preventing to some extent verbose or irrelevant arguments by counsel. An important change in the procedure of the Courts of Session and Justiciary was effected by two Statutes, which enjoined that the judges should hear and decide causes with open doors, except in certain criminal cases, where the former custom of excluding the public during the proof was to be continued.[3] This change marks a point of departure from the Continental model of judicature which Scotland, as the great part of Europe, had adopted from the ecclesiastical tribunals, where the sittings were private. It was probably due to the example of the English Courts, and to the growing feeling that publicity was a safeguard of justice as well as of liberty.

[1] 1693, c. 18, Act. Parl. ix. 283. It is from this Act that the custom of the President adding to his signature the letters I. P. D. (*in præsentia dominorum*), took its rise. [2] 1693, c. 19, Act. Parl. ix. 283.

[3] By the A. S. of 27th May 1532, which first regulated the procedure of the Court, it was provided that all "Advocates and Procuratoures sall entre in the Counsall houss at the calling of all Summondis and actes, and remane quhill the parties have argonit and dispute thair matters at the bar; and than to remove quhen the parties are removit, and than to entre againe at the gevin and pronunciatioune of interlocutors when the parties enteris." The Statutes altering this are 1693, c. 26 and 27.

Finally an Act was passed, under which a Commission was to be appointed, "to take full and exact tryall of all abuses and exorbitancies or exactions practised in prejudice of their Majesties Lieges in any offices of Judicature . . . and how the said abuses have crept in, and from what time, and to take notice and tryall of the Authors and Committers thereof." The same Commission was to complete the work which had been left undone by that of 1672—the Regulation of the Inferior Judicatories.[1] The gravest of the charges against Stair, that he favoured his own sons as advocates, appears to have been unfounded. It was indignantly repudiated by Stair himself in his Apology, although the manner of his repudiation, as Mr. Burton has remarked, shows that this evil practice was then prevalent. "When my sons came to the House," he says, "I did most strictly prohibit them to solicit me in any case, which they did exactly observe, and may safely declare it upon their oaths; and it is known to many others, that there might be no suspicions of their taking anything on my account, but only what was proper in their station."

It is a sign of some progress in public morality that although subtle forms of nepotism may still occasionally occur,[2] this one is unknown. At that time it was so common that the slang name of "peats" or "pets,"[3] came into vogue for the individuals favoured.

[1] 1693, c. 34, Act. Parl. ix. 331.

[2] The question how far patronage may be exercised in favour of relations or friends in preference to others of equal or greater merit has not yet been solved by the casuists; but it has been conveniently settled by politicians and men of the world, that it may be so exercised by all patrons, and its exercise condemned by all who are not patrons. Perhaps a safe rule, if not too high for human nature, would be that relations or friends should not be preferred unless clearly of superior merit.

[3] The origin of this name is obscure, some deriving it from Peter, as the Scotch called Patrick, the first son of a judge so favoured. "When a suitor came to the judge to solicit, my lord enquired 'Have you consulted Pat?' if the answer was affirmative, the usual answer of his lordship was 'I'll inquire of Pat about it; go home and mind your business.'" Others, with more probability, derive it from "Pet." See the amusing pasquil, *Robert Cook's Petition against the Peats*, in Maidment's Scotch Pasquils, p. 222:—

But although the Court did not undertake completely to reform itself—a duty which it would perhaps be too much to expect of any Court—there is evidence during the second as during the first presidency of Stair, that he was not heedless of abuses, or inattentive to the improvement of the administration of justice. Towards the end of 1690 a series of rules of court were enacted to prevent the solicitation of judges, and to guard against the suspicion of partiality, which cast, even when false (nor was it always false), grave discredit on the Court. The servants, by which term must be understood clerks of the judges, were forbidden to act as agents in processes, except in their own or their masters' causes.[1]

The Acts of Sederunt against Solicitation, of 6th November 1677, and 24th December 1679, were printed, fixed on the walls of the Outer-House Court, and ordered to be observed. The judges present engaged on their honour that they would observe these Acts, and this declaration was to be renewed each session.[2] A custom of delivering papers to the judges at

> "The humble petition of Master Robert Cook,
> Haveing spent all his money in following his book,
> Now humbly doth shew to the Lords of the Seat
> That he 's likely to starve unless made a Peat ;
> Yet first he must know whose Peat he must be,
> The President's he cannot, because he has three,
> And for my Lord Hatton, his son, now Sir John,
> By all is declared to be Peattie Patron."

After running through the other judges in similar style, the satirist describes the Peats :—

> "They plead without speaking, consult without wryting,
> And this they doe by some inspiratione,
> And now they have found out a new way of flytting
> Which they doe call solicitatione."

And concludes :—

> "Mr. Cook having considered the nature of the Star,
> Doth find it portends neither famine nor war,
> But destructione of the Peats and confusione of the Lords,
> For which he doth pray in the following words :
> 'Most reverend Comet with the worshipfull tail,
> On the Lords' soul-les peats come thunder and haill ;
> For he plainly doth see if they be alive
> He can never expect to prosper or thryve.'"

[1] A. S. 7th Nov. 1690.

[2] A. S. 11th Nov. 1690.

their own houses having given rise to much and it is to be feared well-deserved scandal, was put a stop to, and the boxes, still used by the judges, were introduced, into which all their papers were to be deposited.[1]

The admission of advocates, and the favour shown to their own kindred, the side on which Scotch judges were most accessible to corrupt influences, are brought into curious juxtaposition by two Acts of Sederunt of the period. The first declared that the Lords were sensible that allowing the extraordinary manner of trial (which was by examination only in Scotch instead of both civil and Scotch law) in favour of persons

[1] A. S. 29th November 1690. This Act gives so curious a picture of a state of things which has passed away, that I give it at length;—"The Lords of Councell and Session, taking to their serious consideration the great inconveniency of sollicitation, which creates difidence in those who have not acquaintance or friends to recommend them, that they are not equally started and putt upon them to go to every Lord's lodgeing, imagining that if they do not that he may think that he is either despised or distrusted, which is a slavery upon the leidges, upon the Lords, and upon the lawyers, who are frequently urged by their clients to go with them or for them to solicite the Lords: Therefor to prevent so evill a custom, which is contrair to several Acts of Sederunt, and contrair to the practice of the most civill nations abroad, the Lords have renewed and enlarged the Acts of Sederunt against sollicitation, and because they find the chief cause of sollicitation is the pretence that the leidges think they are not schure that the Lords get their informations unless they deliver them in their own hands, and therefor take occasion to solicit. For preventing whereof, and for easing the leidges themselves, and the lawyers, they, according to the example of the most famous judicatories abroad, have appoynted boxes for every one of the Lords, to stand on a bank in the Session House from three o'clock to seven o'clock at night, each box having a slitt in which the informations and bills may be let in and cannot be drawen out until the box be opened, the key whereof is to be keept by the judge himself, and to be committed to no other; and each Lord is to send for his box at 7 o'clock at night, that he may have competent time to peruse all the informations therein, and to consider the cause and the citations alleged in the same, whereby none of the leidges can be put to trouble to attend any of the Lords for giving their informations, bills, or answers. Therefore the Lords do declare That they will receive no informations, bills, or answers any other way; and that the receiving the same any other way shall be holden as sollicitatione, except those Lords who are to report, who may receave the informationes of the parties being delivered to the clerk of the process, and by the clerk with the process to the reporter." —A. S. 29th Nov. 1690; see further on the Boxes, A. S. 2d June 1691.

nearly related to any of their number, might encourage their relations to importune the Lords to procure their entry that way, and thereby give occasion to misconstruction and clamour, and provided, "That in time cuming no person shall be admitted advocate being cousin-german or of any nearer degree of kindred to any of the Lords, ordinary or extraordinary, unless they undergo the ordinary trial mentioned in the foresaid Act of Sederunt; and this shall be extended to degrees of affinity as well as consanguinity."[1] The other Act, while it shows the former had not been completely successful, is remarkable also for its recognition of the value of the study of the municipal law. Proceeding on a preamble that the Lords had been importuned of late by frequent applications of persons craving to be admitted advocates without undergoing "their ordinary tryall, both in our law and the civil law, observed these many years bygone, and approven by Acts of Sederunt; and it being expedient to prevent the inconveniences that may ensue upon the granting of such petitions to persons unqualified, although, on the other part, it were not reasonable to exclude persons who have sufficient skill in the municipal law because they have not studied the Roman civill law; therefore the Lords declare that in time coming they will not dispense with the ordinary way of tryall of advocates unless first they be well informed of the person's integrity, good-breeding, honest deportment, and fitness for receiving the office of an advocate, and that he has attended the house a considerable time for qualifying himself thereto; and thereupon they will remit him to the Dean and Faculty of Advocates to be tryed concerning his knowledge of the practique of our law, the styles and forms of process; and that a report be returned thereof under the hand of the Dean of Faculty, with a certificate of his consignation of the dues accustomed to be paid at the entry of such advocates before he be admitted. And that importunity

[1] A. S. 24th November 1691.

may not prevail upon pretences of relation to the Lords, it is hereby declared that no one is to have the benefit of this Act who is cousin-german or of nearer degree to any of the Lords, ordinary or extraordinary, and this be extended to degrees of affinity as well as consanguinity."[1]

The procedure of the Court was regulated by several Acts, most of which, however, relate to temporary abuses, or to forms now obsolete. Yet even amongst these one deserves mention, which after stating that many inconveniencies arise from the large and unnecessary congestion of narratives of matter of fact in informations and bills, spending a great part of the lieges' time unprofitably in reading thereof, declared that the Lords will "take no notice of, nor give any answer to matters of fact in bills and informations except such as shall be distinctly proposed, and the articles thereof marked on the margin, or which bear that the alleadgers offer to prove their alleadgeances."

Some of the Acts of this period trench on substantive law, and do not deal with the law of procedure merely.[2] Kirk and market attendance, at which, by the customary law of Scotland, elided reduction of deeds on the head of deathbed,[3] was declared to mean attendance when people were gathered together in these places for public meeting, and not a chance visit. The favour shown by the Court to what is called the "excellent law of deathbed" was due to the danger apprehended from the influence of the terrors of the Catholic clergy in the last hours of life. It was provided in another Act that no aliment would be allowed to parties who had a depending action, unless it was shown

[1] A. S. 25th June 1692. [2] 29th February 1692.

[3] This law, now abolished, 34 and 35 Vict. c. 81, had been introduced by the custom of Scotland in feudal times.—See Regiam Majestatem 2, cap. 18, sections 7 and 9; Leges Burgorum, cap. 101, and the curious questions and answers of the Burghs of Perth, Lanark, Edinburgh, and Aberdeen, "off landis gevin in sickness," printed in Act. Parl. i. 359. Originally a deed disposing of land made on deathbed was reducible at whatever date thereafter the granter died, but his survival for sixty days, by 1696, cap. 4, validated the deed.

there was a surplus clearly belonging to them, and that judicial factors in sequestrations of estates should be liable for the annual rent or interest of the rents they recovered, or might by diligence have recovered, within a year after they became due.[1]

In order to enable tutors to make up exact inventories of their wards' property, it was enacted that the repositories of deceased persons whose successors were under legal incapacity, such as minority or insanity, should be sealed by the nearest of kin on the father's and mother's sides present at the time, and handed over to the Judge Ordinary, by whom they were afterwards to be opened in the presence of the nearest relatives on both sides, to see if they contained any deed nominating tutors.[2] Tutors and curators who did not make up inventories were by an Act declaratory of a Statute of Charles II. not to be allowed even necessary and profitable expenses of legal processes, but were to be allowed what had been expended on the entertainment of the pupils, or on their houses and estates.

The judicial sale of bankrupts' lands, a frequent subject both of legislative and judicial enactments, was still further regulated[3]—provision being made for greater expedition in procedure.

In the absence of an accurate discrimination of administrative and judicial functions, we find the Court also engaged in imposing and regulating the stent or tax for cleansing the town of Edinburgh,[4] limiting the price of wines,[5] and ordering the removal of beggars, except those who had badges, who were to be allowed to beg at the doors of dwelling-houses, but not in the streets.[6]

In 1695, the year of Stair's death, there was published in

[1] A. S. 31st July 1690.
[2] *Ibid.* 23d November 1692.
[3] *Ibid.* 24th February 1692.
[4] *Ibid.* 26th and 29th February 1692.
[5] The pint of the best French wine was not to exceed twenty-eight shillings Scots, and that of the best Spanish forty shillings.
[6] A. S. 4th July 1692.

London a small octavo volume, entitled "A Vindication of the Divine Perfections, illustrating the Glory of God in them by Reason and Revelation, methodically digested into several Meditations. By a Person of Honour."[1] This work has been generally attributed to Stair, and there is no reason to doubt it is his. It bears internal evidence of his style, and has several references to the *Physiologia*, while its reasoning constantly reminds the reader both of that work and of the *Institutions*. The conjecture of Dr. Irving is highly probable, that part of it is alluded to under the name of an Inquiry concerning Natural Theologie in his contract with his printer in 1681. It had, however, never been published until now, when it was printed anonymously, with a Preface by William Bates and John Howe, two English Nonconformists of great eminence and Arminian leanings. With Howe Stair had probably formed an acquaintance in Holland, where he took refuge at Utrecht in 1686, returning to England in 1689.[2] In commending it to the public they observe:—"We have here an inimitable and instructive Example to Great Men, the Dignity of whose Stations in the World too commonly seems to plead an Exemption from a more Sedulous Intention and Application of Mind to the Affairs of Religion that have final Reference to another World. This Performance of the Noble Author shows it to be a thing not impracticable, as it is most praiseworthy, amidst the greatest secular Employments to find Vacancy, and a Disposition of Spirit to look with a very inquisitive Eye into the deep Things of God: which (*if it were the Author's Pleasure to be known*)

[1] London: Printed by J. D. for Brabazon Aylmer at the Three Pigeons in Cornhill. MDCXCV.

[2] Calamy, *Life of John Howe*, p. 126. Macaulay, ii. 223: "If any man stood higher than Baxter in the estimation of the Protestant Dissenters, that man was John Howe. Howe had, like Baxter, been personally a gainer by the recent change of policy. The same tyranny which had flung Baxter into gaol had driven Howe into banishment; and soon after Baxter had been let out of the King's Bench prison Howe returned from Utrecht to England."

would let it be seen the Statesman and the Divine are not Inconsistencies to a great and comprehensive mind; so as to consider them with Distinction and without confounding them or making the two spheres intersect one another; so that in so large a Theological Work here is no Mixture of Political Matters except where in the Nature of the things themselves they are Contiguous."

In this book, as in everything Stair wrote, there is an admirable distinctness of conception and lucid order in the treatment of the subject proposed. It is divided into eighteen Meditations, of which, though the condensation of the thought makes it difficult, a brief outline will here be given. Besides its intrinsic value, it exhibits a part of Stair's character which otherwise would be imperfectly known, and has been misrepresented.

The Introductory Meditation[1] states the purpose of the work. The greatest Duty of Man is to delight in God, and this forms his highest happiness, but such delight can only arise from a knowledge of the Perfections of God, for according to the measure of the distinctness of the Object is the degree of our delight in it. Nor ought this knowledge to rest in a mere general belief that God is endowed with all possible Perfection; there ought to be a diligent search into the several divine Perfections. The natural order of these is thus explained:—"The divine Dispensations must be posterior, even in time, to his Purposes or Decrees; his Decrees being free must pre-suppose his Freedom and his Will, and these must presuppose his Understanding and Wisdom, and all must be conceived as unto or from a subject to which they are relative." These topics are therefore treated in the work, which follows, in their reverse order. God as a subject is considered in two Meditations,[2] "Upon God being a Spirit," and "Upon the Self-Existence and Eternity of God." Being a Spirit is the only attribute that

[1] Meditation i. [2] Meditations ii. iii.

presupposes nothing anterior. Being a Spirit is the subject of all the Divine attributes, for the being God essentially comprehends them all. God is distinguished from angels and the souls of men, for these, though they have not extension like material bodies, are not purely spirit, which God only is, for they cannot co-exist as He can with any other created substance in the same space. That God is the only pure Spirit is also proved by Scripture.[1] A truly immaterial Spirit must have—(1.) Cogitation or Thought; and (2.) be without Parts, and Indivisible;[2] must (3.) be Omniscient, for there can be no reason why it knows one thing more than another; (4.) cannot want Capacity to determine itself and to choose; (5.) cannot otherwise Act upon Matter than by the Determination of the Will, and must be Omnipotent, for "there can be no reason rendered why the Action should be rather of one kind than of another."[3] He condemns the error of those who regard God as a Substance far more pure than the purest air beyond this sensible world, and that of the Anthropomorphists, "who apprehend God under the determined bounded Figure of

[1] John iv. 24; 2 Cor. iii. 17.

[2] Stair's argument as to God being without parts and indivisible is, that if the divine Spirit have Parts the Cogitation must either be in the whole, or in more Parts, or in one Part only. If in the whole, then the separation of any part loses the Cogitation, and so the Spirit is annihilated. Nor is it conceivable how a Thought can be in many subjects, for Parts are many though they cohere in one Body. If in more Parts severally, then there are as many Spirits as Parts in which the Cogitation is. If Cogitation be but in one the rest were superfluous matter.

[3] The principle of Sufficient Reason, as it was called by his contemporary Leibnitz, plays a great part in Stair's philosophical and theological systems. "By this single principle," viz., "that nothing happens without a reason why it should be so, rather than otherwise," wrote Leibnitz to Dr. Clarke, "may be demonstrated the being of God and all other parts of Metaphysics or Natural Theology; and even in some measure these physical truths that are independent of Mathematics, such as the Dynamical Principles, or the Principles of Forces." Dugald Stewart's criticism of the vagueness and insufficiency of this principle as employed by Leibnitz is equally applicable to its use by Stair.—See *Dissertation on Progress of Philosophy*, ed. 1854, p. 269.

a man, or of any other creature, as well as of those who make bodily Figures to represent him as the Rays of Light in a round or triangular Figure, or in such a shape of a man as he was represented to the Apostle John in the Revelation."

The Self-Existence of God is shown by the acknowledgment of all sects who have pretended to any learning that there is a self-existent Being. Even Atheists acknowledge this, though they deny knowledge to the Active Cause, and suppose it to work by fatal Necessity. Both revelation and reason however prove Creation to be not only possible but true. The objection that a vacuum is inconceivable without conceiving Longitude, Latitude, and Profundity, and therefore the eternal existence of matter, is unfounded, as he had elsewhere shown.[1] God alone, he observes, has self for his end; as Scripture expresses it, "He hath made all things for Himself," and that "of Him and for Him are all things;" and He is eternal, "for whatever is existent without a cause of its existence must necessarily have been ever existent."

From God as a subject, he proceeds to consider the knowledge or understanding of God—as Omniscient.[2] Knowledge is implied in the conception of a self-existent spirit, for "neither the want of extension or the having of penetrability make a spirit." According to Revelation, God's understanding is infinite. It cannot be temporary, or successive, or have degrees, or be the result of habit as human knowledge is, or be derived from outward impressions, "because He is altogether impassible, and can admit of no alteration made on Him from without." Hence there is no more difficulty in apprehending God's foreknowledge than his knowledge, for neither arises from impressions of objects. But the opinions are false that God acts either immediately on all created things, or concurs in all their acts or motives; for if creation be acknowledged, it follows that there might be given to matter "an attempt or

[1] This refers to the *Physiologia*. [2] Meditation iv.

pressure to move in such an uniform course of motion which it would ever follow if it were not hindered, and would always be effectual when the Impediment were removed," and to creatures their proper activities. He concludes this meditation with an argument against God being the author of evil, and against universal predetermination.

From the Knowledge he passes to consider the Will[1] of God, and argues that although nothing exists without that Will, it is possible that He might have willed otherwise than He has done—in other words, that the Divine Will is free. He here combats the notions of the eternity and indestructibility of matter. Reasoning from the analogy of man, pleasure is neither an act of the understanding nor of the will of God, but an object, viz., His own infinite perfection, and the natural or moral perfection of His creatures; hence it follows that God has no pleasure in the sin or death of His rational creatures, which He permits merely. "The blessed and benign God doth never intend the misery of His creature abstractedly and simply, for His last End is His own glory, whereunto the misery of the Creature is no mean, but the Act of Justice upon the sinning creature." The Will of God differs from that of man in that He never wills the impossible, or exercises a conditional Act of Will.

The Power[2] of God is next treated. Power is defined as the principle of Action or Operation, as these are distinguished from Thought and Intention, and the perfection of God's Power is "that it can work all it can will, but doth work only that it doth will," for God limits the Acts of His Power by all His Moral Perfections; He does not abstain from doing evil for want of power to do it, but because it is unworthy of His Nature. Another limit to the actual exercise of the Power of God is that He cannot create a body so great that He could add nothing to it, or give an infinite motion to any body, for to do so

[1] Meditation v. [2] Meditation vi.

would be to exhaust His Power with regard to it, whereas His Power is inexhaustible. Hence the notion of the schoolmen that there are real beings necessary and eternal, and of recent philosophers that matter is eternal, are "but the births of man's brain, inconsistent with the infinite Perfections of God, encroaching upon his Power, his Freedom, and his Wisdom." God's Power is regulated by all His active Perfections, by His Will, by the unchangeableness of His Decrees, by His Purity and Holiness, by His Bounty and Mercy, by His Justice, Fidelity, and Truth. But as regards Will, God's Power is exerted not merely according to His Will, but by the sole Acts of His Will, and this power is an incommunicable Perfection of God, and "therefore it is impossible that any Creature should create, and no more consistent than that God should make more Gods." In connexion with this he takes occasion, in a forcible passage, to state his opinion of the doctrines of Transubstantiation and Baptismal Regeneration. "I pray God Men would advert and consider what ground there is to believe that God hath given a Power to a Priest or Minister, that at his Desire, so oft as he pleases to express the words of Consecration of Bread and Wine in the Eucharist, the most stupendous miracles should then arise of course, or that by their Consecration the Elements should have a Power and Efficacy to confer Grace, or otherwise to confirm it, than that by the solemn Preparation of the Heart and the earnest Prayer of the Creature God would more readily grant their Desire than at other times; or how by applying the water in Baptism at Desire Original Sin should be forgiven, or Grace should be given, which encroacheth not only upon the incommunicable Power of God, but upon his Wisdom, that He should give Grace to all that were baptized, which in the most part would prove frustaneous by being lost."

In the Seventh Meditation, on the Oneness[1] of God, that doctrine is deduced from the Omniscience and Omnipotence of

[1] Meditation vii.

God. The doctrine of the Trinity, including the doctrine of the Incarnation, is briefly stated as revealed by Scripture, and is acknowledged to be "a Mystery, and the greatest Mystery, ushered in with an unparallel'd note of Attention, ὁμολογουμενως, 'Great is the mystery of godliness, God manifested in the flesh.'"

Then follows a curious argument in favour of the view that the original belief of mankind was of One God, from the example, "not only of the Jews, but of Job, Balaam, Moab, Ammon, the sons of Lot, Ishmael, and the Three Wise Men of the East led by a star to Bethlehem." "So that we have no ground to doubt that the knowledge of the one God did long and largely propagate itself in the world, though through defect of History the particulars be little known."[1] He afterwards rapidly traces the origin of polytheism amongst the Greeks and Romans, and the corruptions it gave rise to in imperial Rome when "Christ came to bring Life and Immortality to light, and the Grace of God so far prevailed that a great part of the World embraced the Christian Religion upon its own account, not only without, but against all worldly interest." But after the Roman Emperors had accepted and established it, corruptions again ensued. "In place of the Heathenish sacrifices the Eucharist was made the Sacrament of the Altar, the Presbyters were made Priests, and in place of the Heathen Demigods came the Canonized Saints; and not only their Ghosts in Heaven, but the Relicks of their Bodies upon Earth, were brought in to share with God in Adoration, without any other but a verbal distinction." Against Saint-worship he protests as a derogation from the Unity of God, and incommunicability of His Divine Perfections. He concludes this Meditation with defending the mysteries of Christianity as believed by a new inward sense

[1] That monotheism preceded polytheism is a thesis still defended by many. See Professor Lorimer, *Institutes of Law*, p. 58, and authorities there referred to. It has, however, lost its importance as an argument in Natural Theology, since it has been shown that worship of natural objects in many races preceded both.

granted by God to the regenerate only, and with a distinction in favour of compulsion in religion so far only as clear by the light of Nature, declaring that "it is both against Religion and Humanity to compel Men to supernatural and institute Religion where they believe not these revealed Principles from which Ordinary Capacities cannot refuse clear Inferences which require not long Deductions."[1]

The Eighth Meditation is upon God's Freedom.[2] After discussing certain distinctions of Freedom, which he observes is a relative term, he defines it as "the Hability of Self-determination upon a rational motive." God's freedom is determined by His moral perfections, so that He will never do anything that is not suitable to and becoming His natural perfections.

The two next Meditations deal with the Blessedness[3] and the Holiness[4] of God. The previous perfections he regards as natural, but "Holiness of God and of Creatures exists in the Congruity of their *voluntary* actions to their natures." In treating of the Unchangeableness[5] of God, he guards against several errors in this doctrine, as that God works without regard to particular circumstances, or that "He could not consider the actings of His free Creatures in any of His Decrees, but behoved with a little consideration of decerning to design Rejection and Eternal Misery of some, as of the giving of Grace and Eternal Glory to others," or that He must always act in the same way. The true meaning of it is, "that His eternal Purpose or Intention, being fully suitable to his Divine Nature, could therefore never be changed; and by His Omnipotence it could never fail of the intended Effect."

In considering the Goodness[6] of God, the illustrations given of it show how fixed some of the ideas he had published in the *Physiologia* were in his mind. After stating the creation of

[1] The meaning of the concluding words in this passage is not quite clear, but the general sense appears to be in favour of a wide toleration in religion.
[2] Meditation viii. [3] *Ibid.* ix. [4] *Ibid.* x. [5] *Ibid.* xi. [6] *Ibid.* xii.

rational creatures as the first act of God's goodness, and the endowment of man with the capacity to know consequences, he mentions, as other instances of it, the wonderful structure of the human body, the union of the soul and body, and the inbred inclinations which God has given to the soul—the love of God as the sovereign good, the love of mankind and the love of self, which is also a gift of God, and good when kept within bounds. Besides these general principles, God, he says, has imprinted "special principles on the soul which operate like Instincts without reasoning, as the desire of happiness, the care to preserve life, the abhorrence of cruelty, the desire to relieve the innocent oppressed, gratitude to benefactors, faithfulness to those who do rationally rely and trust, love to those in society, and friendship, specially that which is most entire and absolute by marriages, and the mutual natural affection of parents and children."

It also, he adds, recurring to a favourite idea, proves "the goodness of God that the Discovery of the Natures of the Creatures and all the Experimental Knowledge hath proceeded from the beginning, and shall to the end increase, that there might never be wanting a suitable Exercise, Diversion, and Delight to the more ingenious and inquiring men."

In discussing the Truth[1] of God he points out that it is the necessary foundation of the certainty of knowledge, both natural and revealed. Truth he defines as the conformity both of signs or words to thoughts, and of thoughts to their objects.

He next treats of the Justice[2] of God, and distinguishes the kinds of justice into Commutative, more properly called Attributive, and Distributive, the old Aristotelian division; to which he adds Judicial, by which he seems to have understood a species of Distributive Justice, where a judge imposes rewards and punishments.[3] God's attributive justice differs from that of

[1] Meditation xiii. [2] Meditation xiv.

[3] He here remarks incidentally, "Kings and States ought not to be both

men, "who may take nothing from man that is his own, but as to God men's goods, honour, and freedom are but precarious during His pleasure." He inclines, however, to answer in the negative the question whether God might take away the life of His innocent rational creatures.

As regards God's punitive or judicial justice he observes that it imparts "an exact proportion of rewards and punishments to the objects of them, where man can neither know the exact proportion nor adjust a punishment to expiate any sin. Man's justice is not to satisfy justice or expiate crimes past, but to prevent them for time to come."

In his Meditation on the Mercy[1] of God Stair refuses to go the whole length of the Arminian doctrine, that "Christ died equally for all men, and procured them universal Grace, that they may repent or not at their option;" but he also opposes the Calvinistic extreme, "that Christ purchased nothing except for the elect," and in stating his own view seems to differ very little, if at all, from the Arminians, for he holds that though there is no Grace given to the Reprobate, yet "that it is sincerely offered to all that come to discretion, and that it was the Reprobates' fault that they did reject it." He concludes with the observation that "there is more of mercy expressed in the whole of Scripture than of all other Divine Perfections, the main scope thereof being to show the Mercy of God towards Mankind."

The Faithfulness[2] of God leads him to consider the leading Protestant doctrine of Justification by Faith, for it would be

Judges and Parties where others can be had, but before they enter in War they ought to demand Satisfaction and give sufficient evidence of the fact, and not decline Arbitrement where an indifferent Judge can be found." This is not the only instance of views on statesmanship beyond his age. In another passage he writes:—"If it were not for these perversions the whole Race of Mankind might become one Commonwealth, God having given an inbred Principle to Mankind to prefer the interest of the whole to that of any part."—*Vindication*, p. 252.

[1] Meditation xv. [2] Meditation xvi.

inconsistent with it that God should disappoint the Faith of His creatures. So he declares unhesitatingly that "Faith is the only consideration on which God gives Pardon, Reconciliation, and Happiness, and not upon Love or any other good Work, as never to be claimed upon rewarding Justice or Merit, but of free Favour and Grace alone."

In treating the Wisdom[1] of God he observes that "it were a Task never to be ended to pursue the Wisdom of God in all his Decrees and Dispensations, of which little can be reached in the State of Mortality; yea, it will be the exercise of the Mind to Eternity in the State of Glory, yielding and increasing a Continual Delight." Obliged to select some eminent instances of it, he dwells chiefly on the Acts of Creation, following the order of the Book of Genesis, and using freely the argument from design.

He concludes his work with a chapter on the Dominion[2] of God, and His Dispensations thereupon towards His Rational Creatures, especially by the Covenant of Works and the Covenant of Grace. In the Dominion of God over the world, and His dispensation towards Man, he sees the most complete exhibition of all the Divine Perfections jointly.

The question forces itself, What is the value of such speculations as these? To some they appear mere word-play, useless distinctions, verbal definitions. It is beyond doubt that we see in them the method of the scholastic logic applied to Protestant theology. But beyond the question of method there is one of substance. Perhaps we live in an age too regardless of inquiries of this nature fairly to appreciate them—which has declared its preference for criticism rather than logic, science rather than theology. Nor can this line of argument have any validity for those who do not admit its basis, denying either explicitly or implicitly the existence of God. For those who acknowledge a Supreme Being, the Creator and Governor of the

[1] Meditation xvii. [2] Meditation xviii.

world and man, the case is different. Such persons may either never turn their thoughts towards the character of God at all, or they may regard it as incomprehensible by the finite reason of man, or they may try to conceive it distinctly.

The first, though the most common course, cannot be seriously defended. The second cannot satisfy, to use Stair's expression, the inquiring spirit of man, which demands some knowledge of the object of religion. The third, which is that of Stair, appears the more worthy course to adopt; and whatever defects there may be in the assumptions or the reasoning which are usually to be found in such inquiries, and are certainly not absent from the treatise of Stair, it is the mark of a powerful mind to have attempted to rise "to the height of this great argument," which "asserts Eternal Providence, and justifies the ways of God to men."

On 25th November 1695, in his seventy-seventh year, Stair, who had been in failing health[1] for some time, died in his house in Edinburgh. The inquiry into the massacre of Glencoe, which had ended in the Report incriminating his son, and the attacks on himself and his family, would have tried the spirit of most men. Stair, as we see by his *Apology*, was not indifferent to such attacks; yet he was probably not deeply or long affected by them. Through the changing scenes of his life his mind had known how to preserve its calm.

"Certainly a great part of the governing of Man," he writes in his Meditations, "is by determining his Thoughts to particular objects; the Mind's reflecting on its own Working and Experience will solve the Difficulty, and will find that some things will frequently and almost continually recur to the Thoughts; and above all, the Mind can always recur to the Thoughts of God, wherein if it be not perverted to shun the

[1] "The President is very unwell; Presmennan and Newbyth are invalids, and I doubt if they can return to the Session;" 26th October 1695, Sir James Ogilvy to Mr. Carstairs.—Carstairs's *State Papers*, p. 263.

countenance of these Thoughts, it cannot miss some measure of Cure against any hurtful Pleasure or Grief."[1]

There may be persons who see in such language hypocrisy or self-delusion; they will appear to others the utterance of a sincere and deep experience.

He was buried in the Church of St. Giles, with the solemnities usual for one in his station. No monument marks the spot where he lies. The Scottish nation have till recently been chary of commemorating their great men. It is only a few years since a tablet, trod on by many, but observed by few, was placed close to the same Church over the grave of Knox, the Reformer of their Church.[2] A similar mark of respect may perhaps yet be paid to the chief author of their Law.

The personal appearance of a notable man has always an attraction to his fellows[3]—nor is it to be despised as an index of character, though its signs are often difficult to interpret. Stair appears to have possessed some share of the personal beauty which made his son the Master, and his grandson the

[1] *Vindication*, p. 9.

[2] "When nations, slowly wise and meanly just,
To buried merit raise the tardy bust."

Yet silence is better than the babble of those who, pretending to honour the dead, seek to glorify themselves, their party, or their sect.

[3] Of portraits of Stair I know only two—the one a miniature by Sir John Medina, a Flemish artist, the pupil of Rubens and Duchatel, who was invited to Scotland by Lord Melville, and painted many of the nobility and gentry of this period. There is a copy of larger size of this, and both miniature and copy are now the property of his descendant, Mr. Charles Dalrymple of New Hailes, M.P. for Bute. This has been engraved for the Bannatyne Club, and is common. A second rarer print is engraved in Park's edition of Walpole's *Royal and Noble Authors*, v. 126. Of this I have seen a separate but not very good impression. It is taken at a later age from a portrait which Mr. D. Laing, to whose courtesy I owe the opportunity of inspecting it, conjectures to have been painted by a Scotch artist, Paton.

In both he has the same characteristic features, and wears the judicial dress of the President of the Court. I drew attention some time ago to the possibility of other portraits being in existence (*Scotch Journal of Jurisprudence*, 1868), hoping to elicit some further information on the subject, but as yet without result.

Field-Marshal, reckoned among the handsomest men of their time. Their portraits show that they, as well as his son Hew, inherited several of their features from him. A certain grave dignity is the most marked characteristic of his countenance, but this is a cast of face sometimes acquired by a judge. When so acquired, however, it generally, though not always, for it may be affected, indicates a fitness for the judicial office. It is the result of many years of study, reflection, and observation of human nature. There is also observable in the eyes and lines of the mouth a mildness which is not inconsistent with decision of character, but is rarely found in men of keen passions. A defect in his neck, which his wig or the flattery of the artist has concealed, was a favourite subject with the Pasquil writers, who certainly painted him without flattery.[1]

Macaulay has drawn chiefly from these satirists all the charges his enemies made against Stair, and without examining their truth has insinuated others for which even satire gave no foundation. "The man," he writes, "over whose roof so many curses appeared to hang, did not, as far as we can now judge, fall short of that very low standard of morality which was generally attained by politicians of his age and nation. In force of mind and extent of knowledge he was superior to them all. In his youth he had borne arms; he had then been a

[1] "*Stair's neck*, mind, wyfe, sons, grandson, and the rest
Are *wry*, false, witch, pets, parricide, possessed."
—*Satyre on the Familie of Staire;* Maidment, *Scotch Pasquils*, 178.

"From crook-legged lawyers and *wry-necked judges*,
From all your two-faced subterfuges,
From soldiers who serve without set wages,
Libera nos, Domine."
—*A Litany*, 1671; Maidment, *Scotch Pasquils*, 272.

"*The President with his head on one side*,
He swears that for treason we all shall be tryed,
We tell him 'twas not so with Chancellor Hyde,
And I like my humour weill, boys,
And I like my humour weill."—Maidment, *Scotch Pasquils*, 221.

professor of philosophy; he had then studied law, and had become by general acknowledgment the greatest jurist that his country had produced. In the days of the Protectorate he had been a judge. After the Restoration he had made his peace with the royal family, had sate in the Privy Council, and had presided with unrivalled ability in the Court of Session. He had doubtless borne a share in many unjustifiable Acts; but there were limits which he never passed. He had a wonderful power of giving to any proposition which it suited him to maintain a plausible aspect of legality, and even of justice; and this power[1] he frequently abused. But he was not, like many of those among whom he lived, impudently and unscrupulously servile. Shame or conscience[2] generally restrained him from committing any bad action for which his rare ingenuity could not frame a specious defence; and he was seldom in his place at the Council board when anything outrageously unjust or cruel was to be done.[3] His moderation at length gave offence to the Court. He was deprived of his high office, and found himself in so disagreeable a situation that he retired to Holland. There he employed himself in correcting the great work on jurisprudence which has preserved his memory fresh down to our own time. In his banishment he tried to gain the favour of his fellow exiles, who naturally regarded him with suspicion.[4] He protested, and perhaps[5] with truth, that his hands were pure from the blood of the persecuted Covenanters. He made a high profession of religion, prayed much, and observed weekly days of fasting[6] and humiliation. He

[1] How could such a power—if he really possessed it—be only frequently abused?

[2] It makes some difference whether shame or conscience was the motive, unless we accept the philosophy which identifies them.

[3] The fact is worth more than the supposed inference.

[4] No proof of this has been found.

[5] No ground for this "perhaps" has been discovered.

[6] No proof of this has been found so far as the profession of religion and the weekly fast are concerned, but the following passage in Wodrow's

even consented, after much hesitation, to assist with his advice and his credit the unfortunate enterprise of Argyle. When that enterprise had failed, a prosecution was instituted at Edinburgh against Dalrymple, and his estates would doubtless have been confiscated had they not been saved by an artifice which subsequently became common among the politicians of Scotland. His eldest son and heir-apparent, John, took the side of the Government, supported the dispensing power, declared against the Test, and accepted the place of Lord Advocate when Sir George Mackenzie, after holding out through ten years of foul drudgery, at length showed signs of flagging. The services of the younger Dalrymple were rewarded by a remission of the forfeiture which the offences of the elder had incurred. Those services indeed were not to be despised. For Sir John, though inferior to his father in depth and extent of legal learning, was no common man. His knowledge was great and various, his parts were quick, and his eloquence was singularly ready and graceful. To sanctity he made no pretensions. Indeed Episcopalians and Presbyterians agreed in regarding him as little better than an atheist. During some months Sir John at Edinburgh affected to condemn the disloyalty of his unhappy parent Sir James; and Sir James at Leyden told his Puritan friends how deeply he lamented the wicked compliances of his unhappy child Sir John."[1]

The character of Stair was differently judged by his contemporaries; and although even amongst them opinions varied, the more favourable verdict was pronounced by those who most

Analecta, i. 204, has probably been in the writer's mind:—"His (Stair's) carriage, Mr. Warner tells me, was most Christian when in Holland, and he frequently met with them for prayer, and ordinary once a week keept a private day in his family." The author of the Impartial Narrative, Somers *Tracts*, Scott's Ed. xi. p. 552, says:—"He (besides his private devotions) was never a day in the worst of times but he read the Scripture and prayed himself twice in his family were there never so great or so many strangers present, which might be a reflection in these days, but I hope not now."

[1] *History of England*, iii. 264-5-6.

carefully observed his whole conduct. Mackenzie's panegyric of his excellent parts, his universal understanding, his freedom from passion, has been already quoted, and while he adds, "Most men thought this equality of spirit a mere hypocrisy in him," he does not himself indorse this view. Burnet, indeed, describes him "as a man of great temper, and of very mild deportment, but a cunning man."[1] But this charge, which Stair's Presbyterian principles probably led the bishop (generally inclined to censoriousness in drawing the character of his contemporaries) to adopt, does not appear well founded. His public life, exposed as it was to the keen eye of jealousy, does not show any sign of cunning, though the policy which guided it was such as might be so construed by an unfavourable judge. He was constant and open in his attachment to moderate Constitutional Monarchy, and while not indifferent to place, resigned it when he could not hold it consistently with his principles. It would be more true to accuse him of ambition, but his ambition was honourable, and justified by his talents and his public services. Yet his intimacy with Monk and Lauderdale shows how difficult it is to walk with firm step and erect bearing along that narrow and slippery path.

His adherence to the Protestant religion and Presbyterian form of Church government was equally steadfast. For this he braved the resentment of the Duke of York and suffered exile. His piety, so far as it is possible to judge in such a matter, was unaffected and sincere. "He daily," says Forbes, "prayed always, and read a chapter of the Bible to his family before they sat down to dinner, and performed the like divine service after supper;" nor is the least remarkable characteristic, both of his legal and philosophical treatise, the frequent reference to and intimate knowledge of the Sacred Book. In this, judged by a modern and critical standard, he sometimes intrudes into the province of theology, and borrows from it irrelevant

[1] Burnet, *History of his Own Times*, i. 369.

arguments; but there seems no reason to question his good faith. "He had a great spirit," Forbes adds, "and equal temper in the harshest passages of his life. By the constant bent of his thoughts to what was serious and profitable, he knew how to divert them from any uneasy impression of sorrow. He was apt to forget, at least not to resent, injuries done to him, when it was in his power to requite them." By Presbyterian and Nonconformist divines, who notwithstanding their democratic Church polity have sometimes a liking for pious rank, he was naturally highly rated. "He was well known to the world," says Wodrow, "by his learned works and shining piety." "The clearness and vigour of his spirit," remark the editors of his *Meditations*, "are illustriously visible in managing a subject so deep and difficult," and they praise "the disposition which led him to look with a very inquisitive eye into the deep things of God."[1] Dr. Pitcairn celebrates him, if with the somewhat high-flown and commonplace compliments usual in modern Latin verse, yet even in that not ordinarily applied to a political opponent:[2]—

> "Si potuit virtus si numina juris et æqui
> Victurum toto nomen in orbe dare,
> Fama tibi crescet multo delebilis ævo
> Atque tuas laudes Phoebus uterque canet."

The writer of the *Impartial Narrative* probably detects the main cause of the detraction to which he was exposed:—"I will not say but the Lord Viscount Stair is envied by some people for his parts and growing greatness, but that should be no argument with rational good men, seeing that men's virtues ought not to be accounted their crimes."[3]

As a judge, his close attention to the discharge of duty in the minutest particulars was shown by his reforms in the procedure of the Court, his care of the Registers, and his records of the Decisions.

[1] Preface to Meditations, by W. Bates and J. Howe, vii.

[2] *Poemata*, p. 51.

[3] Somers *Tracts*, Scott's ed. ii. 553.

As a Scotch lawyer, amongst the many remarkable men, his predecessors, contemporaries, and successors, who have followed that profession, no one has disputed his pre-eminence. A practitioner in the present day would indeed claim for the Institutes of Erskine and the Commentaries of Bell the character of more useful works than the Institutions of Stair, but these writers reaped the fruits of his labours. That so small a country has kept itself abreast of advancing jurisprudence, is mainly due to the fact that the foundations of its law were so deeply laid by Stair. Notwithstanding the wealth of precedents supplied by the English and American Courts, often, though not always, presided over by abler judges than those of Scotland, his Institutions will bear a favourable comparison with the most celebrated treatises on English law —the Institutes of Coke, the Commentaries of Blackstone and of Kent.

The parallel between Stair and Bacon was too obvious not to have been made. Both combined the study of law and philosophy. Both held the highest judicial office in their respective countries. Both shared the penalties which frequently attend successful ambition.

Yet, when we look closer, there is more contrast than likeness. Stair's single philosophical treatise can be regarded only as the recreation of an active mind in another than its ordinary sphere. It does not seem to have had any influence in his own time, and has been forgotten since. Bacon gave a new direction in this country to every branch of philosophical inquiry, physical, moral, mental. On the other hand, Bacon, though no mean lawyer, and with many far-sighted ideas for the reform of law which have not yet been fully carried out, did not himself do much for a profession which was to him a servant to be used rather than a mistress to be loved. One who took all knowledge for his province must have at times looked down, as from a great height and a serener air, on the

world of the lawyer and politician, clouded with the dust of the contentions of men, where he himself had striven and erred. Stair was heart and soul a politician and lawyer. The administration of justice—a noble and difficult work, though less noble and difficult than that of the philosopher,—was the chief business of his life. He so discharged it that what he did will endure, not indeed for all time, but until its purpose has been fulfilled. His Acts still live in the Statute-book, his decisions still sometimes guide the Courts, his Institutions have settled the form of the greater part of Scotch law, and educated some of the best lawyers. In mental calibre there can be no question which of the two men was greater. Amongst the lofty intellects with which God has endowed the race that inhabits this island, Bacon stands second to Shakespeare alone. Stair, even in his own sphere not without rivals, must, if we survey the splendid and varied ranks of British genius, yield to many far more illustrious names.

In one respect he was more fortunate. Bacon left behind him no one to transmit his name, and was a conspicuous example of his own saying, that "the noblest works and foundations have proceeded from childless men."[1] Stair is a proof that this apophthegm does not always hold true. He was the ancestor of a long and memorable line. "The family of Dalrymple," writes Sir Walter Scott, a good witness on such a point, "produced within the space of two centuries as many men of talent,

[1] "Which have sought to express the images of their minds where those of their bodies have failed; so the care of posterity is most in those that have no posterity."—Essay, *Of Parents and Children.*

Pitcairn, in the poem already quoted, thus refers to Stair's sons:—

"Sed quamvis meritis non essent numina testes
Nec caneret laudes Phoebus uterque tuas
Quatuor illa fori proles tua fulmina nostri
Fulmina mox nostro plura datura foro
Illa tuas celebrent laudes animasque quaternas
Quas uni voluit Juppiter esse tibi
Munera namque togæ feliciter omnia functus
Quæ nunc sunt nati quatuor, unus eras."

civil and military, of literary, political, and professional eminence, as any house in Scotland." Three at least of his sons Stair lived to see in honourable positions, but not above their merit. Notwithstanding his political unscrupulousness and the black deed of Glencoe, his opponents admitted the Master of Stair to have been one of the ablest lawyers and first statesmen of his age. His second son, Sir James Dalrymple of Borthwick, followed his father's profession, became one of the principal clerks of the Court of Session, and, in a country which has been fruitful in antiquaries, was one of the most accurate and thorough. His third son, Sir Hew Dalrymple of North Berwick, who succeeded his father as President of the Court of Session, was "reckoned one of the best lawyers in Scotland, with a clear understanding and great gravity of manner, an eloquent speaker, smooth and slow in his expression." Thomas Dalrymple, his fourth son, was eminent in another profession, and became Court Physician to Queen Anne. His youngest son, Sir David Dalrymple of Hailes, followed the hereditary calling of the law with distinction and success, holding the office of Lord Advocate under Queen Anne and George I. More eminent perhaps than any of his sons were his grandson, the Field-Marshal Stair, and his great-grandson, Sir David Dalrymple Lord Hailes. The former was equally distinguished in two opposite departments, war and diplomacy; the latter was not only a good judge, but also a critical historian of the first order, at a time when historical criticism was scarcely known.

It would be easy to extend the list of the descendants of Stair, who have shown marked ability of different degrees. Even at the present day there are those in whose veins some of his blood flows, who have shown that they are aware their country may require service from the inheritors of a name it has ennobled. The believer in the hereditary transmission of talent will find in the Dalrymple family an illustration of his favourite theory. Nor is it disputable that in several of its

members there is observable a striking reflection of the intellect and character of Stair. His industry and acumen, his skill in the management of business and of men, his turn for politics, theology, and science, which prevented his mind from being limited by his profession, are visible in varied proportions in the Master of Stair, the Field-Marshal, Sir James Dalrymple of Borthwick, Sir John Dalrymple of Cranston, the historian Lord Hailes, and his brother Alexander Dalrymple the hydrographer. This family, like a nation, has preserved a marked character of its own, which makes it an interesting subject of study.[1] Yet it is proper to remember that these are only a few of his descendants, and that others might be pointed out who owed their success (which must have meant the failure of others less favoured by fortune) to no desert of their own, but to the accident of birth. Even amongst those who were distinguished this cause powerfully contributed to their advancement. Nor did any of them rise so high as their progenitor, whose life has been here I hope truly related. For he may be justly called the founder, not only of the house of Stair, but also of the law of Scotland.

[1] I have learnt with pleasure, while correcting these pages for the press, that Mr. Murray Graham of Murrayshall, Advocate, is likely to give the public an account of the first three Lords Stair. I trust he will include in his work notices of some other members of the Dalrymple family, and in particular of Lord Hailes.

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ERRATA.

Page 4, line 8, *for* great-grandfather, *read* great-great-grandfather.
Page 33, line 13, *for* Sir John Stewart, *read* Sir James Stewart.
Page 84, line 1, *for* decide, *read* deride.
Page 105, line 17, *for* conformation, *read* confirmation.
Page 113, line 10, *for* part, *read* point.
Page 128, line 17, *for* superiors *read* informers.

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